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**THE ROAD TO REGULATION  
OF PRIVATE MILITARY AND SECURITY  
COMPANIES**

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**MPhil**

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**The Road to Regulation of  
Private Military and Security Companies:  
An Analysis of the (Re-)Articulation of the Norms  
Governing the Legitimate Use of Force**

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## **Abstract**

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of Force

Keywords: Monopoly on Violence, Privatisation, Norm Change, Norm  
Entrepreneurs, Legitimacy, Realist Constructivism.

Since the end of the Cold War, private military and security companies have gained a prominent place on the international battlefield. In an attempt to reduce monetary and political costs, states have not only outsourced some of the defense functions previously performed by uniformed personnel; they have also partly privatised the provision of security. Traditional accounts of the rise of private military and security companies have explained this evolution in terms of changing demand and supply of military force after the Cold War, in a neoliberal ideological environment. This rationalist account, however, overlooks the role of norms, which, as the constructivist research tradition has demonstrated, constrain state behaviour even in the domain of national security. From this constructivist point of view, the rise of private military and security companies is surprising given the existence of an anti-mercenary norm and a norm on the state monopoly on violence, both of which have precluded the private exercise of violence. How, then, should the rise of private military and security companies be understood in light of this hostile normative environment? Against a realist-constructivist background, this text draws upon models of norm change and epistemic communities to show that private military and security companies have used their pragmatic legitimacy and epistemic power to decisively shape the discursive construction of a new regulatory framework that legitimises the exercise of non-state violence.

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## Table of Contents

Abstract.....	i
Acknowledgements.....	ii
Table of Contents.....	iii
Introduction.....	1
1. Military Outsourcing and Privatisation.....	14
1.1 Private Military and Security Companies.....	14
1.2 Rise of PMSCs.....	17
1.3 Reasons for Outsourcing and Privatisation.....	23
2. Change in Military Organisation.....	28
2.1 Change in Material Environment.....	29
2.2 Change in Mutual Expectations.....	35
2.3 Change in Morality.....	38
2.4 Change in the Power of Domestic Coalitions.....	43
3. Constructivist Style of Reasoning.....	48
3.1 Constructivist Style of Reasoning.....	49
3.2 Links with other Styles of Reasoning.....	52
3.3 Normative Change.....	57
3.4 The Return of Power.....	64
4. PMSC Power in the New Security Environment.....	71
4.1 Confusion after the Cold War.....	72

4.2 PMSCs in International Law.....	76
4.2.1 PMSCs as Mercenaries.....	77
4.2.2 PMSCs as Combatants or Civilians.....	82
4.3 Epistemic Communities.....	85
4.4 Epistemic PMSCs.....	91
4.5 Reframing PMSCs.....	99
5. Road to Regulation.....	101
5.1 British Road to Regulation.....	106
5.1.1 Green Paper on Private Military Companies.....	108
5.1.2 Consultation on Promoting High Standards of Conduct by Private Military and Security Companies.....	119
5.2 Montreux Document.....	127
5.2.1 Negotiation Process.....	127
5.2.2 Montreux Stipulations.....	131
5.3 International Code of Conduct for Private Security Provider.....	135
Conclusion.....	142
Bibliography.....	151

## Introduction

At the beginning of the 1990s, Thomson (1990 and 1994) set out to explain why states succeeded in establishing a monopoly on the legitimate exercise of violence. Embarking upon the observation that the organisation of military force is “neither timeless nor natural”, she (Thomson, 1994: 1) traces the evolution from the marketisation and commodification of violence to its successful state monopolisation. Since time immemorial, non-state actors have decisively shaped the face of organised violence.<sup>1</sup> In this perspective, the normative consolidation or, in other words, the successful legitimation of the state monopoly on violence in the nineteenth century can indeed be seen as an historical aberration. Nevertheless, this aberration came to define the international politics of the twentieth century as it was canonized in international law, in which “sovereign states [are the] proper legitimate authority to wage war, and no one else” (Reitberger, 2013: 64).<sup>2</sup>

Not more than twenty years later, Thomson’s (1994: 3) main research question - “[w]hy is coercion not an international market commodity?” - seems obsolete. In the meantime we have witnessed a move in the opposite direction: from state monopolisation back to marketisation and commodification of violence. The state monopoly on violence other than in self-defense, that established itself as a defining characteristic of modern states,<sup>3</sup> has come under increasing pressure

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<sup>1</sup> In the “state of nature” before the arrival of the Leviathan, the use of force for the furtherance of private interests was widespread (Owens, 2008: 980, Hobbes, 1998: 82-86). What concerns mercenaries, these have been present in theatres of war since at least 1294 B.C., under the Egyptian Pharaoh Ramses II (Dupuy and Dupuy, 1977: 6).

<sup>2</sup> The non-state actors that did participate in armed conflict, for instance in a liberationist or secessionist struggle for self-determination, were often characterized as “proto-states” (Williams, 2013: 72). Furthermore, article 1 (4) of the 1977 ‘Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts’ states that “armed conflicts in which peoples are fighting against colonial domination, alien occupation or racist regimes are to be considered international conflicts”. <<http://www.icrc.org/ihl/INTRO/470>> (accessed 01/07/2014).

<sup>3</sup> For instance Weber (1994: 310) defines the state as a “human community that (successfully) claims the monopoly of the legitimate use of physical force within a given territory” and Tilly (1990: 1) as “coercion-wielding organizations that are distinct from households and kinship groups and exercise clear priority in some respects over all other organizations within substantial territories”. For Bourdieu (1999: 57) the state is “the culmination of a process of concentration of different species of capital: capital of



from non-state actors to the extent that a norm change might be taking place (Krahmann, 2009 and 2010). Some scholars argue the character of war and warfare has changed since the end of the Cold War (Kaldor, 2001). Contributing to this transformation is the rising inclination toward the outsourcing of activities that have traditionally been performed by uniformed state personnel. As the result of a neoliberal political project that started in the late 1970s, but that gained impetus after the collapse of the bipolar world order, private military and security companies (PMSCs) have obtained a prominent place on the domestic security market as well as on the international battlefield (Abrahamsen and Williams, 2011, Avant, 2005, Schwartz and Swain, 2011). Contractor presence in theatres of war has inflated from a ratio of one to fifty in the first Gulf War (Stanger and Williams, 2006: 4) to roughly one to one in the final stages of the contemporary campaigns in Iraq and Afghanistan (Schwartz, 2011: 9,13). Schwartz and Swain's (2011) estimations indicate that, in 2011, the number of PMSC personnel has surpassed the number of US troops in Iraq; and that, prior to 2010, contractors were slightly more numerous than US troops in Afghanistan. Despite significant divergences between European Union member states, outsourcing nevertheless accounted for more than seven per cent of all defence expenditures in the EU in 2012 (European Defence Agency, 2013). PMSCs have furthermore become current in EU Common Security and Defence Policy operations (Krahmann and Friedendorf, 2011). The United Kingdom is at the vanguard of this European outsourcing trend with, in 2010, sixty per cent of its "overseas operation defense sustainment effort" being spent on contractor support to operations and thirty five per cent of Ministry of Defence employees in Afghanistan being contractors (Heidenkamp, 2012: 2). The ratio of Ministry of Defence contractor personnel to British soldiers has shifted from one to twenty three in the 2003 invasion of Iraq to one to two in 2008 (Kruck, 2014: 123-124). Whereas the Foreign and Commonwealth Office and the Department for International Development have hired private companies for personnel and site protection, it must nevertheless be noted that most PMSC involvement in

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physical force or instruments of coercion (army, police), economic capital, cultural or (better) informational capital, and symbolic capital". The state monopoly on violence culminated in the establishment of military forces to protect the state from external competitors in the emerging interstate politics. On the other hand, it culminated in the establishment of police forces on the other to secure the state internally against aspirations of rivalling political groups (Bourdieu, 1999: 58).

UK military operations has been limited to technical and logistical support functions (Kinsey, 2009: 91-115). In light of the above, it comes as no surprise that traditional military powers would now “struggle to wage war without such private companies” (Schreier and Caparini, 2005: 1).

This bubble of the private military and security industry in the recent campaigns in Iraq and Afghanistan forces us to reconsider some of the research questions answered by Thomson. Although of recent origin, a substantive research tradition has already addressed why states have increasingly come to rely on private providers of violence; and why the exercise of legitimate violence has been partly reprivatised, remarkitized and redemocratized. This debate predominantly addressed realist-materialist explanations for the steep rise in PMSCs’ popularity and a sustained analysis of why PMSCs came to be morally accepted in the twenty-first century has been notoriously absent. This lacuna is remarkable for several reasons. First, the materialist-oriented realist perspective overlooks the findings of an established constructivist research tradition, that has demonstrated the role of norms in directing state behaviour (cf. Percy, 2007a, Finnemore, 1996, Katzenstein, 1996, Checkel, 1998). Conventional wisdom has attributed the emergence of PMSCs mainly to a shifting demand and supply of military force after the end of the Cold War. In a neoliberal environment, departments of defence did not escape the wave of “new public management” inspired by managerial economics and business administration (Deitelhof and Geis, 2009: 18, Ortiz, 2010). Prominent military powers drastically slimmed down their standing forces and relied on PMSCs as force multipliers. In turn, PMSCs were staffed by discharged service personnel. Assuming that private companies possessed a comparative advantage vis-à-vis state agencies and that, through competition, the market would be able to provide security services at a greater cost-effectiveness than unwieldy and bureaucratic government agencies (Cockayne, 2009: 198), military outsourcing fits in and is “a product of the wholesale privatization of goods and services across a whole range of activities previously regarded as the exclusive domain of the state” (Jones, 2006: 361). Even if outsourcing does not *ipso facto* entail monetary savings for the government (Parker and Hartley, 2003, Fredland,

2004)<sup>4</sup>, cost savings need not be restricted to the monetary level. Contracting PMSCs might reduce political costs through shortening “political and bureaucratic lead time” and through shifting decision-making to the executive at the expense of the legislative branch of government (Avant, 2007: 457-459). In this light, Deitelhof and Geis (2009: 25) speak of the “deparliamentarisation and self-empowerment of the executives” in the security field. PMSCs might open up the opportunity to circumvent the casualty sensitivity (Gelpi, Feaver and Reifler, 2005) of contemporary, post-heroic societies (Luttwak, 1995) or even to wage war by proxy (Newton, 2005, Mumford, 2013). Since PMSC casualties seldom make it into the media headlines - amounting to what has been called a “media mystery” (Pew Research Center, 2007) - governments feel less obliged to justify their use vis-à-vis their citizens. This might lead to a greater willingness on the side of governments to engage in military operations abroad<sup>5</sup>, but entails risks of losing control. It also disadvantages public and parliamentary oversight by reducing transparency (Avant and Sigelman, 2010).

So, despite some anomalies<sup>6</sup>, from a realist point of view the rise of PMSCs is comprehensible. However, this calculation of material costs and benefits ignores the findings of an established constructivist research tradition. An economic cost-benefit analysis of the provision of goods and services through public or private agents only makes sense once it has been normatively agreed which goods and services are socially desirable and which are not (viz. which are legal and which are illegal) (Brauer, 2008: 109). Mechanisms of supply and demand are only allowed to operate once social mores have come to accept security as being eligible for trade on the market. Thus, before any decision can be made on how best to provide a good or service, it should be clarified whether the good or service is public or private in “character” (Brauer and Van Tuyll,

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<sup>4</sup> To put it less euphemistically, PMSCs frequently drive up operating costs in comparison to the in-house provision of the same services by government employees (Markusen, 2003). What is more, evidence of the comparative advantage of uniformed military personnel in some areas of service provision was available when initial outsourcing decisions were on the drawing board (Parker and Hartley, 2003, Markusen, 2003, Petersohn 2011).

<sup>5</sup> For instance, Schooner (2008) notes how the use of private contractors, whose casualties are less extensively reported in mainstream media, can affect the popular support of a government and thus steer the chance of reelection.

<sup>6</sup> For instance, in the long term, states may lose their built-up capacity and knowledge, due to the ‘brain-drain’ of qualified military personnel to private companies.

2008: 308). Public or private are indeed social constructs (Owens, 2008: 979) and the boundaries between public and private goods are fluid (Brauer and Van Tuyl, 2008: 311).

Furthermore, privatisation is fundamentally a political decision. Even if profound, shifts in the demand and supply of military force after the Cold War might as well have been written off as a “passing phenomenon” (FCO, 2002: 12). They did not compel outsourcing. As Hartley (2003: 108) argues, policy makers had a variety of options at their disposal confronted with the post-Cold War decline of real defence budgets and rising capital and equipment costs. One of those was to cut down ambitions and to reconsider their defence policy by reducing training levels and forestalling investments in equipment. Another option was to pursue defence integration on the multinational (e.g. European) level. Turning to the private sector was one option among many and, indeed, governments’ responses towards PMSCs have varied considerably, even in comparable circumstances.<sup>7</sup> What has sometimes been overlooked in the debate is that governments could only turn to the private sector if this was morally accepted, viz. if relying on PMSCs was viewed as a legitimate option.

Surprising in this regard, is that PMSCs came to prominence in a hostile normative environment. A strong anti-mercenary norm, particularly manifest from the 1960s to the 1980s, resulted in several, admittedly flawed, anti-mercenary conventions (Percy, 2007b). Arguably, this anti-mercenary norm was an expression of the “foundational norm” of the state monopoly on violence (Krahmann, 2013: 58). As recently as 1997, United Nations Secretary General Koffi Annan, still claimed that “the world may not be ready to privatize peace” (UN, 1998), hereby expressing a reluctant, not to say abolitionist stance towards the engagement of PMSCs. Fifteen years later, however, a pragmatic consensus has crystallised in policy circles and academic literature. PMSCs are no longer pariahs but are recognised as legitimate actors. The focus has shifted to identifying shortcomings in the current regulatory framework and to formulating best practices for future governance (Percy, 2006, Chesterman and

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<sup>7</sup> Whereas the US and the UK have been at the forefront of privatising and outsourcing, other West European states have taken a more reluctant approach (Jäger and Kümmel, 2007).

Lehnardt, 2009).<sup>8</sup> Today, instead of outlawing PMSCs, as propagated by the abolitionist approach (Chesterman and Lehnardt, 2009: 1), the world seems ready to privatise peace and has done so to a significant extent.<sup>9</sup> This remarkable switch from abolitionism to pragmatism gives support to the claim that what we are witnessing today is a normative change on who possesses the authority to instigate violence. In this market environment, not only states, but also multinational corporations and non-governmental organisations (cf. Spearin, 2008) can hire a PMSC. In short, the commodification and marketisation of military violence - as was the common form of military organisation before the nineteenth century (Thomson, 1990) - might very well have returned at the beginning of the twenty-first century (Walker and Whyte, 2005: 651); thus reducing the state monopoly on violence to the relatively short interval of the twentieth century. What accounts for this changing normative approach towards private providers of military force? This is the research question this text wants to address: how did PMSCs become normatively accepted actors in the international security domain despite a normative environment that was hostile to the private provision of military force? Via which dynamics of legitimation did PMSCs successfully claim a legitimate role in the global provision of security?

Legitimacy is essentially a social construct. In his often-cited definition, Suchman (1995: 574) describes legitimacy as “a generalized perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions”. The constructivist turn in international relations theory has demonstrated that identities and norms decisively steer state behaviour; even if seemingly contrary to a realist cost-benefit analysis, and even in sensitive areas such as the organisation of military force. In a process which constructivist scholars refer to as the mutual constitution of agents and structures, norms

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<sup>8</sup> An assessment that is also shared by the 2013 Annual report to the Human Rights Council of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination. Accessible at <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N13/432/64/PDF/N1343264.pdf?OpenElement>>, (accessed 01/07/2014).

<sup>9</sup> Even the UN has hired PMSCs for a variety of functions (Østensen, 2011).

shape the identities and permissible actions of agents. At the same time, however, this normative environment is itself constantly shaped and reshaped by the practices of individual actors. In reply to the above questions, this article will trace how normative claims have steered the rise of PMSCs and how PMSCs have themselves impacted upon this set of norms. The challenges to the anti-mercenary norm, and by extension to the norm on the state monopoly on violence, sat uneasily with constructivist scholarship and have given rise to seemingly contradictory claims. On the one hand, some authors have stressed the continued relevance of these two norms. Percy (2007a), for instance, has argued that the centuries-old norm against mercenaries is still relevant today; and that it has decisively impacted upon the development of the contemporary private military and security industry. On the other hand, in light of the current popularity of PMSCs and of the switch from abolitionism to pragmatism, Percy's observation seems counterintuitive. The norms seem to have been regularly transgressed. As a consequence, they might have lost their prominence - an argument that was reinforced by claims that PMSCs were operating in a "law-accountability vacuum" (Walker and Whyte, 2005: 687); or that the industry is regulated by "simple economics" rather than by the rule of law (Singer, 2004: 524). These statements confer the image that we have returned to a situation of realist self-help, unrestrained by intersubjective rules. Even if, strictly speaking, PMSCs are not mercenaries and, as such, are not covered by the anti-mercenary conventions, they nevertheless carry the "taint of a mercenary reputation" (Salzman, 2008). By focusing on the persistence of the norm against mercenaries, Percy overestimates the relevance of that norm and loses sight of its changing nature and influence (Panke and Petersohn, 2012). She overlooks how PMSCs have themselves impacted upon existing norms and accepts a relatively unchanging structural normative environment. A second normative discussion focuses on the relevance of the state monopoly on violence. Subject to erosion from above (delegation to international and supranational organisations) and from below (delegation to subnational and non-state actors), the state is struggling to maintain its monopolistic decision-making power in the domain of military violence (Bailes, Schneckener and Wulf, 2007). Although they are still "crucial", states no longer enjoy the privilege they once did in theories of state sovereignty (Pierson, 2004: 158-159). Interest in the changing norm on the state monopoly on violence is on the rise (cf. Krahmann, 2009 and

2013). Nevertheless, existing accounts have frequently overlooked the mechanisms of norm change and in particular the role of norm entrepreneurs in the process of the legitimization of non-state actors. It is my argument that this confusion is fuelled by the underdevelopment of existing models of norm change. More specifically, constructivist scholarship currently seems unable to incorporate the present instance of norm rearticulation. Nevertheless, I also consider social constructivism to be the most fruitful approach towards international relations. Therefore, in order to maintain this claim, this text first and foremost proposes a reconceptualisation of the conceptual versions of normative change, that will serve as a heuristic tool for analysing the contemporary debate. The present, confused and confusing, debate on the anti-mercenary norm and the norm of the state monopoly on violence serves as an illustration of the desirability of such a tool. If this heuristic device can usefully steer research in this domain, it might be substantiated in further research and contribute to strengthening the constructivist curriculum. Secondly, this text aims to overcome the traditional divide between realist and constructivist accounts of military change.

To deliver on the above promises, this text counters the orthodox, realist-informed, narrative of the rise of PMSCs. Constructivist scholars argue that “cultural imperatives” and “ideational foundations” more accurately explain the structuring of armed forces and are to be preferred over a model that sees states as rational maximisers driven by financial considerations (Petersohn, 2011: 153-154). Realist and constructivist approaches have developed next to each other and do not adequately recognise each other’s explanatory successes. I will argue that, independently, neither model can fully explain the rise of PMSCs. Instead of contrasting both approaches, this text therefore combines diverse explanatory variables. It brings Barkin’s (2011: 1-8) argument against paradigmatic castle-building into practice and goes one step further to state that the rise of PMSCs cannot be understood without fully integrating various accounts into one comprehensive model. It analyses why norms have changed and, above all, why they have shifted in a particular direction. The latter question has not been adequately addressed in existing research on PMSCs. Constructivist scholarship does not provide sufficient clues to reveal who can authoritatively shape the outcome of a discursive negotiation. It has

been recognised by constructivist scholars that the ideational environment is not given *a priori* but emerges intersubjectively. However, existing accounts of norm change suffer from the criticism made by Barkin (2011: 111-114) in the sense that they remain embedded in constructivist, meta-theoretical assumptions of co-constitution of structures and do not adequately incorporate a notion of agency. This text elaborates existing models of norm change, but complements them with an explicit recognition of the role of power. Doing so, I build upon realist constructivist theory to show that realism and constructivism are not either/or accounts. There is no compelling reason why an ideational foundation should *a priori* exclude the distribution of material resources as an explanatory variable or *vice versa*. The privatisation of military activities can neither be explained solely by material, nor solely by ideational elements. By combining realist and constructivist elements into one account, this text wants to overcome the current division of the literature. Only the combination of these two approaches, it is argued, can adequately explain the popularity of PMSCs. The realist constructivist ‘style of reasoning’ that informs the central argument of this text allows the analyst to take into account material and normative elements that contributed to the reconfiguration of the organisation of military force. Against this background, I will start from the model of norm change developed by Sandholtz (2008), but move beyond it in two regards. Firstly, I will look for analogies between the current transformation in the military domain and previous changes in the organisation of military force, i.e. the shift away from mercenary use towards citizen armies in the nineteenth century. Secondly, the epistemic communities’ literature will provide insights in the role of epistemic power in instances of norm change. This will allow to better comprehend which norm entrepreneurs can decisively shape a new norm. The conclusions drawn from these theoretical reflections will guide the empirical analysis of this project.

I will trace the processes that resulted in three regulatory initiatives that helped shape the future governance of the private military and security industry. I understand process-tracing in the sense of Collier (2011: 823) as a “systematic examination of diagnostic evidence selected and analyzed in light of research questions and hypotheses posed by the investigator”. Process-tracing aims to uncover the causal process that leads from an independent variable to a



particular outcome (George and Bennet, 2005: 206-207).<sup>10</sup> This research project thus resorts under the subcategory of “explaining-outcome” process-tracing (Beach and Pedersen, 2013: 3).<sup>11</sup> Following Beach and Pedersen (2013: 18), explaining-outcome process-tracing has the ambition to “craft a minimally sufficient explanation of a particular outcome, with sufficiently defined as an explanation that accounts for all of the important aspects of an outcome with no redundant parts being present”. Explaining-outcome process-tracing is case-specific and combines structural and case-specific causal links that explain the outcome in question. It draws upon theoretical insights as “heuristic instruments” that embed a particular case in more general theories (Beach and Pedersen, 2013: 19). Explaining-outcome process-tracing is an “iterative” research process in which a deductive and inductive strategy continuously interact. First, existing theories are scanned on potential explanatory mechanisms for the outcome in question. If, after empirical testing, these theories do not fully explain the outcome, they are “reconceptualized” on the basis of the newly gathered evidence from the case-specific empirical analysis. The resulting theory is then tested and modified “until the result is a theorized mechanism that provides a minimally sufficient explanation of the particular outcome” (Beach and Pedersen, 2013: 19-20, 63-64).

Furthermore, this text takes legal stipulations to be the reflection (Thomas, 2001) and formal codification (Sandholtz and Stiles, 2009: 1) of norms. Norms, as shared beliefs, are only observable in their consequences, i.e. when they induce (state) behaviour or in the discourses and rhetoric surrounding an issue (Bjorkdahl, 2002: 13). In the latter case, they are most visible in “codified and recorded” forms, such as international laws, conventions and their preparatory works (Farrell, 2002: 60). Another indication of the strength of a norm is provided by references to an international norm in political discourse, domestic policies and institutions (Farrell, 2002: 61). Justificatory discourses for non-compliance leave a “trail of communication” (Bjorkdahl, 2002: 13). From this point of view, change in the legal framework is indicative of a change in underlying norms. This text will delve into the contemporary reformulation of the

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<sup>10</sup> In light of the meta-theoretical framework of this text, it might be better to speak of contingent and “empirically plausible” (Price and Reus-Smit, 1998: 272) causal processes.

<sup>11</sup> The other two categories are theory-testing and theory-building process tracing.

legal framework governing the use of force. Doing so, I will focus on three governance initiatives that have contributed to this reformulation: the United Kingdom's policy of self-regulation of the industry, the intergovernmental 'Montreux Document' and the 'International Code of Conduct for Private Security Providers'. At first sight, these governance initiatives can be seen as the outcome of a "general deliberation" (Manin, 1987: 352) or as a "negotiated consensus" (Steffek, 2003: 267). Especially in the former two cases, the negotiations leading to the policy proposal or to the signing of the document are particularly well documented. In addition, various organisations have reacted to these policies. These regulatory initiatives therefore lend themselves to a process-tracing analysis. A comparison of the negotiated outcome with the discourses of the various actors involved in the negotiation will consequently provide evidence of the relative weight of each of the participants in the drafting process.

Notably, the process-tracing will show that NGOs succeeded in creating a debate on the appropriate governance of the industry, but that their arguments were not accepted as compelling reasons for the delegitimation of PMSC activities. This was because the norms NGOs defended clashed with the aims and interests of government and the private military industry. NGOs furthermore lacked the material resources to set the terms of the debate, as well as the pragmatic legitimacy to provide state security in the absence of PMSCs. Simultaneously, PMSCs cooperated with the UK government to shape the conditions of the debate, which is why they were able to influence the outcome of the deliberation. The option proposed by NGOs was perceived as morally optimal, but practically unachievable. This outcome shows that PMSCs possessed considerable realist constructivist power – meaning they had the ability to participate in this deliberation and to shape its final outcome. In contrast to Steffek (2003: 267), who stresses that governance as a "negotiated consensus" is only successful if its justificatory discourse is rationally assented to by the people it affects; this research project will thus show that assent can (also) simply be the result of a lack of material or epistemic resources to call into question the existing normative framework.

The focus of this research project is on the United Kingdom. It is so for several reasons. First, while the UK is at the forefront of outsourcing and privatisation in Europe, other states are slowly moving in the same direction. From this perspective, the UK policy can be seen as a ‘quasi-experiment’, which offers lessons to later adopters. Military innovation in one country, if perceived as successful (Posen, 1993: 82) can be the source of innovation, through imitation in other countries (Waltz, 1979: 127). In the case of defence privatisation in the EU, the UK is “testing the boundaries” (James, Cox and Rigby, 2005: 155). But also other EU member states are experimenting with military services privatisation (cf. Richter (2007) for Germany and Bakker and Sossai (2012) for other EU member states). Partly this is because the financial pressures on their defence budgets resulting from the economic and financial crisis has urged them to look for cost savings (Mölling and Brune, 2011: 42). Budgetary pressures have driven cuts in state spending and have subjected defence spending to stronger scrutiny (Meyer and Strickmann, 2011: 75). From this perspective, PMSCs offer a venue to increase state capabilities in the security domain at a lower financial cost. In addition, the push for harmonisation of the European regulation of the private military and security industry (Krahmann, 2005a: 292) might well lead to the further diffusion of the regulatory approach of the UK; especially since UK officials take a central position in governance networks of European security (Mérand, Hoffman and Irondelle, 2011: 129-131). Methodologically, the UK thus displays elements of a “revelatory case study”, in the terminology of Yin (2009: 48). The scope and depth of outsourcing and privatisation in the UK and the British regulatory approach have not been observed in other European cases. Focusing attention on the UK might reveal empirical and theoretical insights relevant for other states and other research domains. Following one of the case selection techniques of Gerring (2007: 101), the UK is therefore an “extreme” case. As such, it is not representative of the broader population of states, but it can serve as an “exploratory method” (Seawright and Gerring, 2008: 302) to identify possible causes of norm change not observable in other cases. This can help strengthen existing models of norm change.

The text will proceed as follows. The first chapter defines PMSCs. It sketches the international environment that formed the background to the rise of PMSCs

and discusses the orthodox, neorealist informed narrative of the rise of the contemporary PMSC industry. The second chapter reviews competing explanations of military change, applied to the disappearance of mercenary armies and their replacement by citizen armies in the nineteenth century. This change in military organisation has been attributed to changes in material conditions, in morality, in mutual expectations of statesmen and in the power distribution of domestic coalitions - all of which will be reviewed. This discussion will reveal that some questions remain, necessitating a refinement of the models discussed. Therefore, the third chapter will introduce the realist-constructivist style of reasoning that underlies this text and will link constructivism to other styles of reasoning, noting similarities and divergences. Furthermore, this chapter discusses diverse models of norm change and draws up an eclectic model to inform this study. Consequently, the fourth chapter discusses the concept of epistemic communities. It frames the PMSC industry as an epistemic community. This chapter will argue that the crucial role of PMSCs in the current instance of norm change lies in their epistemic power, which grants them the opportunity to help shape the decisions of states and the future regulatory environment of the industry. Finally, the fifth chapter will empirically check the theoretical model in the three cases mentioned above.

## **1. Military Outsourcing and Privatisation**

Terminological and conceptual confusion hampers even the most basic debate on the private military and security industry. Despite a continuing quest for a universally agreed upon definition of private military and security companies (PMSCs), no agreement has currently been reached, neither in the academic nor in the political and legal domains. This terminological discord reveals a more fundamental theoretical confusion that extends to the (still unclear) reconfiguration of the state monopoly on violence. This first chapter proceeds into this “definitional morass” (Isenberg, 2008: 14) to expound how PMSCs will be understood in this text and to sketch their rise and their relation with uniformed military personnel. Section 1.1 consists of a presentation of contemporary PMSCs; followed, in section 1.2, by a sketch of the international environment in which these actors gained popularity. Section 1.3 presents the traditional (neo)realistic justification of the outsourcing and privatisation of military activities. Studies on the private military and security industry frequently lack an encompassing theoretical framework. Underlying the present text is the assumption that more explicit attention to theoretical presuppositions and even “styles of reasoning” (Hacking, 2002) can help make sense of the shifting roles of new and traditional actors in the security sector. The third chapter will therefore elaborate on the constructivist theoretical framework that informs this study and that contradicts some of the meta-theoretical foundations of traditional (neo)realistis accounts.

### **1.1 Private Military and Security Companies**

For the sake of this text, private military and security companies will be considered as private, for-profit enterprises that operate in situations of armed conflict; where they offer military and security services traditionally performed by uniformed state personnel, irrespective of the clients of these services, which can include corporations, non-governmental organisations and government agencies. Contemporary PMSCs are professionally organised businesses, legally registered under private law and driven by an intention to make profit (Branovič, 2011: 5). More specifically, this text will focus on those activities that might induce private companies to use military force. It deserves attention that

in this text, the term 'PMSC' only refers to those corporations working in, or in preparation for situations of armed conflict, which are themselves defined as circumstances where governmental or territorial issues are contested by means of armed force (cf. Uppsala Conflict Data Project, 2014). In this environment, PMSC employees carry out services that were once reserved for uniformed military personnel (Schreier and Caparini, 2005: 17). Originally, furthermore, the term private military company (PMC) was reserved for companies that provided 'military' services, including training, instruction and simulation, but also logistic and equipment support and even operational capabilities and frontline services. Private security companies (PSCs), then, are those companies that ensure protection - whether through consulting, intelligence provision, guarding, electronic supervision - in relatively pacified, non-conflict zones (Wulf, 2005: 43). This text, however, groups these two categories under the comprehensive term 'PMSC' for several reasons. First, different organisations use different categorisations. Even companies that would classify under the PMC category will seldom refer to themselves as such. They prefer the term PSC, which carries with it a more neutral connotation, partly because PSCs are naturalised in established democracies. Second, the distinction between offensive, military activities and defensive, protection tasks is not always easy to draw and opinions on its utility diverge. In practice, the distinction between offensive and defensive services not only tends to be blurred in unstable and rapidly changing environments, where security guards can experience sustained attacks by armed forces; but is also situation-specific. Similar activities can sometimes be offensive, while at other times defensive (Holmqvist, 2005: 5). If, in zones of conflict, guarding activities are meant to prevent critical infrastructure from being destroyed, this resembles military support activities to a large extent. Significantly, international humanitarian law does also not distinguish between offensive and defensive military operations, but groups them together under the term "taking part in hostilities" (Gillard, 2006: 31). Similarly, the following paragraph makes clear that analytical distinctions are not always sustainable in practice. Next to this, it moreover needs to be noted that, on the globalised market, the major companies offer services domestically as well as on the international market (Carmola, 2013: 23). What is more, in many instances, military oriented services are offered alongside more traditional security services by some of the major companies in this segment of the market

(Abrahamsen and Williams, 2011: 38-57). In this respect, it is interesting to see how Chesterman and Lehnardt (2007: 3) at first do argue for the utility of the distinction between PMCs and PSCs, invoking a difference between more offensive services in conflict zones provided by PMCs and more defensive or guarding services in stable environments, provided by PSCs. In their view, PMCs are defined as “firms providing services outside their home states with the potential for use of lethal force, as well as training of and advice to militaries that substantially affects their war-fighting capabilities” (Chesterman and Lehnardt, 2007: 2-3). So it says a lot that, in the second volume of the same research project, the editors matter-of-factly opt for the term PMSC (Chesterman and Fisher, 2009). ‘PMSC’ is now the most widely adopted term in academic literature to refer to companies offering protective services in situations of armed conflict. Most PMSCs no longer openly perform offensive combat activities and only offer defensive services for the protection of their clients in insecure environments. Nevertheless, the boundary remains sketchy.

Taxonomies and typologies of PMSCs vary depending on the author or institution designing them. Singer’s (2004: 91-100, cf. also Avant (2005)) “tip of the spear” typology divides the private military industry into military support firms, military consultant firms, and military provider firms. Her categorization is based on their position on the battlefield and ranked from long distance to close proximity to the frontline. The arguments in this text mainly concern the latter category, closest to the frontline. PMSCs engage in consultation and planning, logistic and support activities, technical services, maintenance and repair of military material, training, peacekeeping and humanitarian assistance, and even combat activities (Wulf, 2005: 45-46). To these functions can be added intelligence gathering, “reconnaissance, surveillance and monitoring” (Schreier and Caparini, 2005: 25). Based on a review of the literature on PMSCs’ activities in Iraq and Afghanistan, Taylor (2011: 447) divides armed conflict and peacebuilding operations into four spaces. In the first space, supplies are delivered to ensure the continuity of military activity. The second space concerns “activities within relatively secure bases to keep people and equipment ready for use”. The third and fourth spaces respectively deal with “military operational activity; and reconstruction and development”. In the former two spaces, support for military operational activity is provided. This support

concerns both troops and equipment because military personnel needs housing, food, laundry services and communication services; while equipment needs to be maintained and repaired (Taylor, 2011: 448). Maintenance is often of a high-tech nature and necessitates civilian specialists. The boundary between support for operational activities and operational activities themselves is not always strictly defined. Transport of military equipment is frequently carried out by contractors. Nevertheless, this constitutes a preferred target for attacks, necessitating armed protection, frequently outsourced to contractors (Taylor, 2011: 448). In the operational space, the use of PMSCs is generally limited to non-combat activities such as interpretation, interrogation and intelligence analysis (Taylor, 2011: 448). In the reconstruction and development space, Taylor (2011: 448-449) indicates that PMSCs are involved in the provision of two kinds of services. On the one hand, they protect the people engaged in reconstruction and the material used for it. On the other, they provide (operational) training “for local armed forces, gendarmeries and police” (Taylor, 2011: 448). Of course, these ideal-type spaces are constantly challenged by the permanent flux of the private military and security industry. In this respect, Jameson (2010) already notes how PMSC personnel are in fact taking up combat activities, e.g. the operation of drones for the Dutch military in the NATO operation in Afghanistan. Furthermore, the casualty figures are an extra indicator of the very thin line between combat and non-combat activities. Contractor casualties constitute nearly thirty per cent of US deaths in the war in Iraq and Afghanistan between 2001 and 2011 (Schooner and Swan, 2012: 19).

## 1.2 Rise of PMSCs

Military privatisation is not a recent phenomenon.<sup>12</sup> Private military entities have been present on the battlefield at least since the second millennium B.C.

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<sup>12</sup> The early roots of PMSCs go back, if not to ancient mercenaries, then at least to the forces protecting the early modern trading companies - most notably the Dutch East India Company and the English East India Company, termed “embryonic private military companies” by Ortiz (2007: 11). More recently, since the 1950s with Budget Bureau Bulletin 55-4, the US Federal Government formally decided to procure products and services through the market if this is not contrary to public interest. In the 1960s and 1970s, the UK saw the emergence of several private military service providers (O’Brien, 2000). However, the real boom in the private military services industry only came after the end of the Cold War.



(Dupuy and Dupuy, 1977: 6). Military privatisation has manifested itself differently throughout history, but underlying these different forms was an international system dominated by non-state violence (Thomson, 1994: 3). Thomson (1994: 3) asserts that “[i]n the six centuries leading up to 1900, global violence was democratized, marketized, and internationalized”. Although the state monopoly on violence only came to its full deployment at the end of the nineteenth century and although even then this monopoly resembled a normative and theoretical ideal construct rather than a factual situation. It emerged as one of the constituting elements of modern states. Nonetheless, this social ideal construction has now come under pressure as a result of the contemporary inclination toward the outsourcing and privatisation of activities that, until recently, were performed by uniformed state personnel. From this point of view, the twentieth century could even be seen as an interlude in which the state (haphazardly) succeeded in establishing a monopoly on violence; which is now again giving way to organisational mechanisms of coercive power and military capability, that actually rhyme with pre-nineteenth century mechanisms. At least since the 1980s, domestic private security providers as well as their international counterparts have contributed to these evolutions. In the domestic security domain the trend toward private policing manifests itself nearly everywhere in Europe (Van Steden and Sarre, 2007), the United States (Krahmann, 2010), Africa and Asia (Abrahamsen and Williams, 2011).

The focus of this text, however, bares on the international dimension of armed conflict and, more specifically, on the transformation in the composition of the armed forces conducting military operations. The rise of PMSCs contributes to, but is itself also part of a broader evolution toward a new type of organised violence. Kaldor (2001: 3-4) distinguishes between old and new wars. The latter manifest themselves since the 1980s and 1990s, partly in reaction to the end of the Cold War, but instigated no less by a renewed emergence of globalisation. New wars are defined by a blurred distinction between war, organised crime and large-scale violations of human rights (Kaldor, 2001: 2). Münkler’s (2003) analysis of the wars of the early twenty-first century overlaps to a large extent with Kaldor’s observations. Both authors argue that new wars are characterised by an overlap of the private and the public sphere, of state and non-state involvement, of formal and informal participation and of economic and political

motives. Kaldor (2001: 4) asserts:

The new wars arise in the context of the erosion of the autonomy of the state and in some extreme cases the disintegration of the state. In particular, they occur in the context of the erosion of the monopoly of legitimate organized violence. This monopoly is eroded from above and from below.

PMSCs contribute to this evolution, but are by no means the only actors defying the state's monopoly on legitimate violence. Instead, Kaldor (2001: 92) identifies five main groups - public and private, state and non-state - fighting in contemporary armed conflict: "regular armed forces or remnants thereof; paramilitary groups; self-defence units; foreign mercenaries; and finally, regular foreign troops generally under international auspices". This author is not isolated in placing PMSCs under the fourth category of foreign mercenaries, but this classification has been the subject of a lively academic debate. Positions have varied from equating PMSCs with mercenaries (Bjork and Jones, 2005, Adams, 2002) to typifying PMSCs as "new model mercenaries" (Percy, 2007a: 206), or as "the corporate evolution of the age-old profession of mercenaries" (Singer, 2005: 119); to pointing out the differences between them and classifying them in different categories, frequently on the basis of a strict interpretation of article 47 of the Geneva Conventions and the International Convention against the Recruitment, Use, Financing and Training of Mercenaries (for instance Isenberg, 2009). The legal aspect of these discussions will be highlighted in the third chapter. The "global ungovernance" (Leander, 2002) at the turn of the century did lead to some notable instances of unregulated and unaccountable PMSC behaviour, among which the Nisour Square Shootings and the Abu Ghraib scandals stand out.<sup>13</sup> The perception of

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<sup>13</sup> On the Nisour Square Shootings, cf. Johnston and Broder (2007) "F.B.I. Says Guards Killed 14 Iraqis Without Cause". *The New York Times*. 14/11/2007. p. A 1. <[http://www.nytimes.com/2007/11/14/world/middleeast/14blackwater.html?pagewanted=2&\\_r=1&sq=17.%20nov.%202007&st=cse&adxnnl=1&scp=5&adxnnlx=1273766420-cNwM0%20GG97voGrMuBOQeA](http://www.nytimes.com/2007/11/14/world/middleeast/14blackwater.html?pagewanted=2&_r=1&sq=17.%20nov.%202007&st=cse&adxnnl=1&scp=5&adxnnlx=1273766420-cNwM0%20GG97voGrMuBOQeA)>, (accessed 01/07/2014). On the Abu Ghraib Scandal, see among others Schooner (2005) and Musgrove (2009): "Court Rejects Suit Against CACI Over Abu Ghraib Torture: Contractor Granted Wartime Immunity". *The Washington Post*. 12/09/2009. p. A 14.

unaccountability and ungovernance has however stimulated the development of several governance initiatives aiming at the strengthening of the regulatory framework of PMSCs (Francioni and Ronzitti, 2011).

Four interrelated developments are usually invoked to explain the contemporary tendency toward military outsourcing and privatisation. In his landmark publication *Corporate Warriors: The Rise of the Privatized Military Industry*, Singer (2004) mentions three of them. Bellamy, Williams and Griffin (2010) add a fourth one. These developments help describe the international environment in which military outsourcing and privatisation takes place, but fail to offer compelling reasons for such decisions. Although Singer (2004: 66) only discusses the “tidal wave of global privatization” as the third factor in the rise of PMSCs, I maintain that we can only make sense of the other factors by acknowledging a ‘paradigm shift’ from Keynesianism to neoliberalism (cf. Hay, 2001) as the primary dynamic. A cost benefit analysis of the provision of goods and services through public or private agents only makes sense once a normative analysis has established which goods and services are deemed socially desirable and which are not (legal versus illegal) (Brauer, 2008: 109) and which modes of provision are morally acceptable. The mechanisms of supply and demand are only allowed to operate once social mores have come to accept security as being eligible for trade on the market. In this respect, the 1979 electoral victory of Thatcher in the UK, followed by that of Reagan in the US in 1981, provided the neoliberal lens through which later changes in the security environment were conceptualized in terms of ‘supply’ and ‘demand’. The policies propagated by the US and the UK - and previously in Chile, after the coup of Pinochet in 1973 (Harvey, 2007: 9) - were quickly picked up by international institutions like the IMF and the World Bank to be promoted throughout the Third World.

Outsourcing manifested itself through various practices that had in common that states transferred control over the means of production (in the case of goods) or provision (in the case of services) to private companies, in an attempt to drive

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<<http://www.washingtonpost.com/wp-dyn/content/article/2009/09/11/AR2009091103285.html>>. (accessed 01/07/2014).

up efficiency. It was increasingly assumed that through competition the market would be able to provide security at a greater cost-efficiency than unwieldy and bureaucratic government agencies (Cockayne, 2009: 198). In light of the finite amount of resources at the disposal of the state, turning to the private sector holds an appealing promise: if private contractors can provide the same goods or services as in-house personnel, using less resources; then the state can achieve more of its objectives for the same availability of resources. Outsourcing even took place in areas that used to be considered inherently governmental, such as the management of prisons and postal services (Singer, 2003: 67). It is worth dwelling for a moment on the difference between outsourcing and privatization. It can be made clear by referring to the analogy of rowing and steering (Osborne and Gaebler, 1992). When an organisation decides to outsource certain functions, it deliberately releases control over the means of production (rowing), but retains firm control over the aims at which the services or goods will be directed (steering). It is a strategy to enhance the capacity of the state or to do 'more with less.' Whereas the state has partly given up its hierarchical command and control mode of regulation (Crawford, 2006: 450), it still sets out the course to be followed by the private actors. An example of this is the privatisation in the 1980s of some of the formerly nationalised British defence companies (Walker and Whyte, 2005).

Privatisation, in a narrow sense, then, refers to the transfer of the steering function to private agents. The state retreats to a post-regulatory position (Scot, 2004) and defines the boundaries within which international and non-governmental organisations and corporations can provide their own security. Privatisation took a central place in the "loosely connected set of concepts, distinctions and ideas" of neoliberalism (Kjær and Pedersen, 2001: 221), which saw the state as the protector of the rule of law and of individual property rights in order to facilitate "marketization" or the replacement of government control of economic interactions by free economic exchange (Simmons, Dobbin and Garrett, 2008: 2). Harvey (2007: 65) states that "[w]hile personal and individual freedom in the marketplace is guaranteed, each individual is held responsible and accountable for his or her own actions and well-being" - which increasingly came to include security. However, this neoliberal project comes into collision with international law that continues to see states as an exclusive controller of

the use of violence. The last chapter will focus on the friction this generates.

The second dynamic consists of the end of the Cold War. This event entailed a shift in the global security market, partly driven by an increase in levels of conflict around the world due to state-implosion, the reappearance of international wars and the growing influence of international markets (Singer, 2003: 50-51). Non-state groups (e.g. criminals, insurgents and warlords), unregulated by the world community, took up their place in these armed conflicts. Combined with the emergence of new conflicts, they created a demand on the security market that was met by PMSCs (Singer, 2003: 49-52). Non-state groups as well as government elites trying to protect themselves hired PMSCs. PMSCs themselves benefited from a market flood of labor and tools, instigated by the downsizing of military equipment and the demobilisation of experienced military personnel (Singer, 2003: 53). Contributing to this dynamic was the “decline of local state governance”, which is intrinsically linked to the incapability of these states to maintain a fully functioning military apparatus. Once again it created opportunities for PMSC assistance (Singer, 2003: 55-58). In fragile states, the political survival of government elites often depended on their ability to militarily control strategic, resource-rich areas. Contracting PMSCs offered an advantage in this struggle.

Thirdly, Singer (2003: 64) distinguishes “transformations in the nature of warfare”. The above-mentioned empowerment of non-state actors and the related criminalisation of warfare opened up further opportunities for PMSCs; because this kind of warfare is often messier and more intractable than previous forms (Singer, 2003: 64-66). A more fundamental transformation, however, is the enhanced technological complexity of contemporary military technologies. This complexity leads to a blurring of the line between military and civilian technologies, occupations and functions (Singer, 2003: 62-64). In Singer’s words (2003: 64): “[T]he weapons systems required to carry out the highest levels of conflict are becoming so complex that as many as five different companies are often required to help just one U.S. military unit carry out its operations”.

Bellamy, Williams and Griffin (2010: 322) add that PMSCs helped the UN and

other international organisations to overcome the capacity gaps caused by the significant increase in peace operations at the beginning of the 1990s. Not only these capacity gaps but also the reluctance of the major powers to intervene militarily in international conflicts not directly related to their own security opened up opportunities for the private military industry.

These conditions roughly constitute the international environment in which military outsourcing took place. However, they do not offer a compelling explanation for the rise in outsourcing. In this environment, governments still had to make the make-or-buy decision concerning military force. Some states chose to outsource the activities others wanted to keep in the hands of uniformed state personnel. Nevertheless, even states that displayed an initial reluctance to the outsourcing of those activities have recently shown a more receptive attitude. In contrast to the UK, where outsourcing was a preferred policy option, The Netherlands has long resisted the international outsourcing trend (Gielink, Buitenhuis and Moelker, 2007), although recently it also yielded to the lure of PMSCs (Krahmann and Friesendorf, 2011: 15, Jameson, 2010). In spite of the increasing use of PMSCs, outsourcing levels in Germany and France do not come close to those in the US and the UK, neither quantitatively nor qualitatively (Kruck, 2014: 125-127). This indicates that the decision to resort to private sector suppliers of military services is not solely an economic cost-benefit analysis. It also involves a profound normative debate on the proper role of state and non-state actors in the international society.

### 1.3 Reasons for Outsourcing and Privatisation

Several arguments have been offered to justify the outsourcing of military activities, frequently framed in terms of “advancing the public interest” (Likosky, 2009: 11-12). Schwartz and Swain (2011: 2) summarise these arguments as follows:

Since contractors can be hired faster than DOD [i.e. the US Department of Defence] can develop an internal capability, contractors can be quickly deployed to provide critical support capabilities when necessary. Contractors also

provide expertise in specialized fields that DOD may not possess, such as linguistics. Using contractors can also save DOD money. Contractors can be hired when a particular need arises and be let go when their services are no longer needed. Hiring contractors only as needed can be cheaper in the long run than maintaining a permanent in-house capability. Using local nationals as contractors could also help develop the local economy and workforce, contributing to stability and counter-insurgency operations.

However, the remainder of this section will show how these traditional arguments have been contested by recent research.

Inherent in the privatisation wave of the 1980s and 1990s was a belief in the greater cost-effectiveness of PMSCs in comparison to uniformed state personnel. Brauer (2008: 104) makes explicit the economic rationale underlying the outsourcing of military activities and asserts that “in an exchange, as one good is received, another good (often, but not necessarily, money) is given up. The benefit received is greater than the value of what is given up, or else the agent would not wish to buy”. Even though the agent can sometimes make mistakes, it can be assumed that he or she will not repeatedly buy goods which produce a smaller benefit than the value of what is given up (Brauer, 2008: 104). However, a purely financially motivated cost-benefit justification frequently falls short of explaining particular outsourcing decisions. In their economic analysis of the financial costs of the most recent war in Iraq, Stiglitz and Bilmes (2009) demonstrate that military outsourcing has benefited PMSCs, while not significantly reducing operational expenses for the US government, on the contrary. These authors (Stiglitz and Bilmes, 2009: 11) note that the increasing US reliance on contractors in Iraq and Afghanistan, “has increased operational expenses far more than if we had relied solely on the Army”. Not only are PMSCs driving up operational expenses, Stiglitz and Bilmes (2009: 12) argue that the military is also competing against itself because the Army is forced to raise bonuses for re-enlisting due to the higher wages experienced personnel are offered by PMSCs. Next to this financial argument against outsourcing, the authors point out two supplementary elements tipping the balance in favour of

the 'make-decision' of military force. They argue that PMSCs fall outside the reach of military discipline and supervision and they extensively illustrate that profiteering and corruption abound (Stiglitz and Bilmes, 2009: 12-13). Stiglitz and Bilmes are not isolated in taking this position. Both of these arguments are supported by academic research and investigative journalism (Dickinson, 2009, Cameron, 2006, Frulli, 2011). Next to the increasing cost for the US government, PMSCs also generate negative effects for the local Iraqi economy and consequently for the US' image by importing cheaper, foreign workers from low-wage countries, thus undermining Iraqi economic recovery (Stiglitz and Bilmes, 2009: 143). Despite a policy intention of engaging more local nationals as contractors, this percentage recently dropped significantly in Afghanistan and Iraq combined (from 49 per cent in December 2009 to 36 per cent in March 2011) (Schwarz and Swain, 2011: 8). Stiglitz and Bilmes (2009: 194) unsurprisingly conclude that the taxpayer is not receiving value for money and that "the risks of losing control may well outweigh budgetary considerations".

The Commission on Wartime Contracting in Iraq and Afghanistan's (CWCIA) final report to the US Congress depicts an even less favourable assessment of US military outsourcing in these recent conflicts. This Commission concludes that the US government is currently over-relying on PMSCs and mentions the operational, political and financial risks entailed. Regarding operational risks, the Commission (CWCIA, 2011: 29) estimates that the over-reliance on PMSCs leads to a loss of "mission-essential organic capability" by the government. Such knowledge can shift to contractors because of the inconsistent, and often too short, rotation periods of service members across military services and civilian agencies (CWCIA, 2011: 29). The members of his commission express the concern that in this way PMSCs may *de facto* take over control of "defense, diplomatic, and development activities" (CWCIA, 2011: 29). Concerning political risks, the authors note how employing local contractors can boost the local economy, which leads the host-nation and its citizens to look up to the US (CWCIA 2011: 29). At the same time, however, the economic benefits for the local economy are counterbalanced by a twofold risk. On the one hand, an all too intrusive penetration of the local economy can exceed the absorptive capacity of that economy, distorting economic activity and causing inflation, fraud and corruption. On the other hand, the withdrawal of the US military



contractors leaves many local employees without a job, undermining economic recovery and leading the unemployed to seek other job opportunities, often offered by local insurgent groups (CWCIA, 2011: 29-30). The third category of risks entailed by the over-reliance on PMSCs amounts to the financial losses governments make by outsourcing. The authors point out that “extensive contingency-contract waste, fraud, and abuses are the most obvious” and estimate the wasted amount between \$31 and \$60 billion, a number which was “foreseeable and avoidable” (CWCIA, 2011: 30-32). The diversion of money paid to military contractors, but ending up in the pockets of local warlords and insurgents to grant safe passage for convoys and personnel contributes to runaway spending on PMSCs (CWCIA, 2011: 32).

An interesting addition to the risks identified above is provided by the Iraq war logs, i.e. leaked documents concerning the war in Iraq released by Wikileaks. These allow an inside perspective on the conduct of that war. Glanz and Lehen (2010) have discussed these documents in a *New York Times* article entitled “Use of Contractors Added to War’s Chaos in Iraq”. The documents make clear that contractor personnel are often involved in fire fights and difficult to identify due to the lack of a standardised uniform (Glanz and Lehen, 2010). Furthermore, the indiscriminate and mostly unjustified shootings by PMSC personnel at civilians, American and Iraqi security forces and other contractors evoked public outrage which did not make work easier for the coalition troops (Glanz and Lehen, 2010). Glanz and Lehen (2010) add the following:

For all the contractors’ bravado — Iraq was packed with beefy men with beards and flak jackets — and for all the debates about their necessity, it is clear from the documents that the contractors appeared notably ineffective at keeping themselves and the people they were paid to protect from being killed.

Furthermore, the documents reveal that PMSCs are suffering from a lack of accountability. Because this issue has extensively been debated in previous research (Francioni and Ronzitti, 2011, Chesterman and Fisher, 2009), this text will not repeat those arguments.

Taken together, the above-mentioned arguments paint a grim picture of the military outsourcing policy. Nevertheless, indicators of a change in policy and/or of a reconsideration of the strategy toward PMSCs remain scarce (Kruck, 2014: 122-123). However, a purely realist-informed narrative of the popularity of PMSCs, focusing on material incentives for states pursuing their own interests fails to account for at least two irregularities. First, as discussed in this section, states often act against their own interests in contracting with PMSCs. Second, the above narrative overlooks the role of norms in the international realm and conceptualises states as actors without normative concerns. This is surprising since international law has long considered states, or state-like entities, the only actors authorized to use violence in the international realm (Reitberger, 2013: 64). PMSCs have been approached from a normative point of view before. Percy (2007) explains the contemporary persistence of the norm against mercenary use and how this norm has shaped the governance of mercenaries throughout several centuries, thus also exerting influence on the governance of PMSCs today. However, by focusing on the persistence of this norm, she loses sight of its changing nature. Therefore, a model of norm change is necessary to approach the rise of PMSCs. The following chapter will argue that the current instance of military change is not fully captured by existing theoretical perspectives. In response, the third chapter will make explicit the theoretical backbone of this study, which subsequently informs a new theoretical model of norm change.

## 2. Change in Military Organisation

Change in the organisation of military force has inspired military theorists, historians and political scientists alike to draw up various theoretical models of military change, grounded in diverse theoretical backgrounds. This second chapter reviews competing accounts of a specific manifestation of military change at the end of the eighteenth, beginning of the nineteenth century. This manifestation is the disappearance of mercenary armies and their replacement by citizen armies, usually composed by means of conscription. Although a precursory shift away from *ad hoc* mercenary armies to more permanent standing armies can already be discerned in the fifteenth century with the reign of Charles VII in France (1429-1461); the state only succeeded in consolidating its monopoly on violence in the first half of the twentieth century. The American and French Revolutions were critical in this regard. Afterwards, the actors traditionally dominating the international 'market' for violence - such as mercenaries, privateers, pirates and overseas trading companies - were nearly completely brought under the control of their home states.

In the following, these arguments will be discussed in function of the recent move in the opposite direction, i.e. away from the state monopoly on the legitimate use of force (Krahmann, 2009, Bailes, Schneckener and Wulf, 2007). The aim of this exercise is to see if these accounts can help explain this move through analogical reasoning and by providing a theoretical framework for change in military history. In this respect, four theoretical models of the development of the state monopoly on force can roughly be discerned - more or less coinciding with the broader evolution in international relations theory. The academic debate on this topic, as it is structured in this text, culminates in the work of Avant (2000), the last of four models presented below. While Avant's combination of material and ideational factors in domestic power coalitions goes a long way in remediating the gaps of rivalling models, some elements in her proposal remain unclear. These obscurities are the impetus to a structured review of the literature on norm change in the following chapter. Combined with the insights of Avant, the findings presented there will allow us to systematically tackle the research question.

This chapter proceeds as follows. The first section sets out realist and materialist arguments for military change, complemented with a rational choice perspective. Sections 2.2 and 2.3 will respectively address Thomson's sociological institutionalist argument and Percy's constructivist argument. Even though both authors attribute a central role to norms in the emergence of the state monopoly on violence; this subdivision is warranted, since they not only attribute a different content to the norms, but speak of a different kind of norm altogether. The fourth section discusses the argument made by Avant (2000), who sees material and ideational factors as antecedent conditions, but attributes a central role to domestic power coalitions.

## 2.1 Change in Material Environment

From a realist-oriented point of view, military systems emerge as functional reactions to environmental constraints. In a continuous "struggle for wealth, power and prestige" (Andreski, 1968: 7) states will rationally choose those policies that are most useful in ultimately strengthening their power (Waltz, 1979, Keohane, 1986, Donnelly 2000: 7). Strategic responses to material pressures thus result in changes in military practices (Gooch, 1980, Cohen, 1985). As catalysts for change, arguments in this tradition typically stress population growth (Posen, 1993), technological evolutions (McNeill, 1982), tactical military changes (Palmer, 1986), and sometimes economic motives (Brauer, 1999). Cohen (1985: 25) elaborates on this view in his discussion of the American military system and notes that in the design of their military service system, states are guided by two sorts of demands, namely "those of external necessity - the constraints placed on their participation in world politics, their status as sovereign members of the state system, and their location on the globe - and those of ideology". The military system in a particular country is thus shaped by geopolitical necessities such as the length of its borders and the size of its population. It is also shaped by the imperatives of war itself, because different types of war require different types of military organization. Large-scale military operations require another type of military force than small wars, which again differs from the forces needed in, for example, counter guerilla warfare (Cohen 1985: 25, 35-38). In this perspective, ideology refers to an ideal military strategy. It comprises the ideas of individuals or groups on what strategies will

most likely lead to victory. It is important to note from the beginning that these ideological drivers differ from normative constraints. While ideology need not be intersubjectively shared, this is a prerequisite of a norm.<sup>14</sup>

Realism explains the gradual disappearance of mercenary units as a functional response to external necessities. Citizen armies won wars because they were more sizeable (Cohen, 1985) or better motivated (Posen, 1993). Eventually, the mass conscript armies territorial states were able to raise, emerged as the new path to success and set the example for European nation states (Gooch, 1980: 25). In this respect, military evolutions are closely linked to the formation, evolution and reconceptualization of states. The competition between European states required them to militarily adapt to technological and tactical innovations, causing a change in political organisation (Downing, 1992: 56-83). The mutually constitutive relationship between states and war has been elaborated on most explicitly by Tilly (1975: 73), as summarised in his adage “war made the state and the state made war”. Tilly (1990) demonstrates how state-building is not confidently planned and depends on external factors such as geopolitics, war and international relations; but even more on how the interplay of capital and coercion generates cities and states. To stage and wage a war, rulers depended on the financial, technical and human resources they were able to extract from their subordinates and “[w]ithin limits set by the demands and rewards of other states, extraction and struggle over the means of war created the central organizational structures of states” (Tilly, 1990: 27-28). Consequently, national differences can be explained by the struggle of subordinate social classes against resource extraction and by the methods wielded to overcome that resistance (Tilly, 1990: 27-28). Tilly (1990: 58) hints at the realist arguments when he notes that, in a competitive environment, the political entity most efficiently staging mass armies eventually gained an advantage over smaller actors, subsequently driving the latter out of the political arena. In this competitive arena, it was the magnitude of the standing army that decided over victory or loss. The military advantage went to those political entities that were able to draw upon their own population to create a large standing force. As Tilly

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<sup>14</sup> Knight (2006: 619) offers a broad definition of ideology as “the way a system - a single individual or even a whole society - rationalizes itself”. Interpreted in this way, ideology need not be intersubjectively shared.

(1990: 58, 63) says: “states having access to a combination of large rural populations, capitalists, and relatively commercialized economies won out”. Eventually, the national state “set the terms of war” and other forms of state organisation gradually converged on that model (Tilly, 1990: 58).

The initial mercenaries’ assignment comprised keeping the domestic population under control. Once this control was more or less achieved, however, mercenaries themselves posed a potential threat to the rulers, especially when irregular pay drove them to look for alternative income-generating methods, such as banditry and plundering (Tilly, 1990: 83). In this line of reasoning, a common problem with hired military units was that they placed a heavy burden on local populations since they regularly - and mostly in between contracts - “took to living off the land” (Singer, 2003: 29). Thus, the gains in fiscal costs to the rulers were outweighed by the higher social costs (Singer, 2003: 29). The fact that this marauding also undermined the tax bases of newly emerging states aggravated the problem (Singer, 2003: 29). The economic costs and political risks of enlisting, disbanding and re-enlisting mercenaries became excessive for rulers, who were reluctant to trust the costly and often unreliable mercenary entrepreneurs (Singer, 2003: 30). In addition, the mounting costs of large-scale warfare generated a search for cheaper labour, which could be found in citizen armies (Tilly, 1990: 83). Changes on the supply side of mercenary activity contributed to this evolution:

During the eighteenth century, the vast expansion of rural industry opened up alternative economic opportunities to the people of major regions, such as highland Switzerland, that had been exporting soldiers and domestic servants to the rest of Europe, and thus squeezed the supply of mercenaries. The French Revolution and Napoleon gave the *coup de grâce* to the mercenary system by raising huge, effective armies chiefly from France’s own expanding territory (Tilly 1990: 83).

A final factor is the economies of scale, that further drove changes in military

organization. Technological developments (most prominently firearms) reduced the length of training and proved advantageous for mass armies (Singer, 2003: 29-30).

Thus, in a struggle over political power and economic resources, mercenarism eventually gave way to a double pressure. On the one hand, states asserted a more systematic control over potentially rivalling mercenary groups to ensure their political survival (Cockayne, 2006: 467). On the other hand, the above-mentioned technological innovations - such as firearms, tactical developments and more disciplined military drill - shifted the comparative advantage from mercenaries to locally recruited armed forces. They succeeded more easily in raising funds to defend a territory because those resources flowed back to the population itself, in the form of defence constructions and training of local forces (Cockayne, 2006: 467). Building upon this local anchorage, territorial states developed hierarchical administrations, which “allowed [public rulers] to offer a range of public infrastructures to commercial clients which military entrepreneurs could not” (Cockayne, 2006: 467). Eventually, the European nation state, with its large standing army emerged as the paramount political and military organisation. Whereas rulers initially considered the raising of citizen armies to be costly and politically risky - due to potential rebellions - citizen armies later became the norm. After the French Revolution they replaced mercenary armies in this respect (Tilly, 1990: 82). The mounting economic costs and political risks associated with hiring increasingly higher numbers of mercenaries forced state rulers to turn to their own subjects to populate their armies (Tilly, 1990: 82-83); and a nationalist motivation, deliberately cultivated by states, helped in creating a more constant and reliable recruiting pool for mass armies (Posen 1993). Contrary to a more constructivist approach, nationalism is not the source of the disappearance of mercenaries, but the consequence of a search for a more reliable armed force.

In line with a materialist orientation, Brauer and Van Tuyll (2008) resort to economics to broaden the field of military history and to explain military change. These authors focus on the bloom and decline of the mercenary system in the 1300s and 1400s, exemplified by the *condottieri* in Italy (Brauer and Van Tuyll, 2008: 85). While mercenaries did not disappear in subsequent centuries, they

did adopt another form and partly merged with more permanent, standing armies until their large-scale disappearance from the eighteenth century onwards. Brauer and Van Tuyll's (2008: 118) account of the transformation of the Italian mercenary system draws upon economic principles such as 'opportunity costs', 'expected marginal costs and benefits', 'substitution', 'diminishing marginal returns' and 'asymmetric information'; applying to both hidden characteristics and hidden action. Within this framework, these authors identify several interdependent and mutually enforcing evolutions. They (Brauer and Van Tuyll, 2008: 103-104) offer an innovative insight when they note a convergence of interests of the demand and supply side of mercenary force, i.e. of city-states and *condottieri* respectively:

So long as Italian *condottieri* were freely roaming from contract to contract, their interest lay in prolonged, or prolonging, conflict among their paymasters. Once they acquired landed wealth and cities of their own, their interest lay in reducing conflict to reduce the drain on tax revenue, at least on their own territories.

This 'settling down' of mercenaries in the city-states can be conceptualised as a reaction to the specific problems posed by mercenary armies. First of all, as hinted at above, one of the common problems with these armies was that they often lived off the land - after their demobilization or when their payment came late. To resolve these problems, Italian city-states (often in alliance with each other) offered longer-term contracts and moved towards the erection of permanent standing armies (Brauer and Van Tuyll, 2008: 108-109). Longer term contracts also helped alleviate the financial burden of sustaining prolonged war efforts executed by *condottieri*, which became untenable for fifteenth-century Italian city-states (Brauer and Van Tuyll, 2008: 106). The interaction between mercenaries and local civilians led to the former's integration in the local communities. Meanwhile, they also failed to keep up with technological innovations, new methods of warfare and the increased differentiation in technical skills (Brauer and Van Tuyll, 2008: 111). In addition to power politics and technological evolutions, the authors also point out problems with the contracts (*condotte*) to explain the eventual demise of *condottieri*. In this regard,



the political, legal and administrative factors were not decisive. Rather it were “the difficulties of holding parties to contractual promises, with contract enforcement in a word” (Brauer and Van Tuyll, 2008: 96). The asymmetry of information between the contracting parties (in the advantage of the *condottieri*) was paramount. It manifested itself in different forms such as the principal-agent problem, problems with subcontracting and contract-holdup or contract renegotiation in the face of a battle (Brauer and Van Tuyll, 2008: 84). Interestingly, similar criticisms return in the discussion on contemporary outsourcing to PMSCs. The combination of the above elements led Italian city-states to raise and train their own armies composed of locally recruited staff. The eventual disappearance of *condottieri*, however, is not fully representative of the general situation in Europe, where mercenaries survived as a more or less accepted actor at least until the French Revolution. Indeed, the large-scale transition from mercenary to citizen armies has to be situated in the nineteenth century.

This nineteenth century transformation presents us with challenges the realist tradition is unable to counter. It is at least surprising that political entities so profoundly varying in size, population, geography and other aspects all opted for similar approach, i.e. citizen armies (Kinsey, 2006: 41). A realist, for instance, might expect small states with small populations to continue opting for mercenaries. Furthermore, as Avant (2000: 46) demonstrates, “[t]here is no conspicuous reason to believe that [small professional mercenary] armies would have proved internationally inefficient”. Additionally, a realist would also expect that later changes in the international security landscape would be conducive to the reappearance of mercenaries, especially in the event of (the creation of) new mechanisms allowing tighter state control. Nevertheless, mercenaries did not re-appear, apart from some isolated and much-criticised occurrences. What is more, the institutionalisation of anti-mercenary legislation illuminates that the use of mercenaries even became an *a priori* invalid option. The next sections will address these critiques.

## 2.2 Change in Mutual Expectations

In line with the general evolution of international relations theory, realist arguments have come under pressure from rivalling explanations invoking ideational and normative changes. A sociological institutionalist argument, elaborated by Thomson (1990 and 1994) draws on the importance of new ideas to explain the demise of mercenarism. In this case, the newly developed notion of neutrality resulted in the “institutionalization of a new norm of state control over non-state violence in the international system” (Thomson, 1990: 24). To prepare for a comparison with rivalling constructivist accounts, it is revealing to shed some light on the origins of this norm. Thomson (1990: 24) traces back the origins of the norm to the French Revolutionary War, where it started off as a reflection of state practices. Subsequently, these practices assumed a more universal adherence among states, ending up as a “new standard for statesmanship”. To be considered and respected as a sovereign state, state leaders had to respect the norm of controlling their citizens’ actions in the international realm (Thomson, 1990: 24). A norm, for Thomson (1990: 43), is thus an expression of “mutual expectations among statesmen”.

This sociological institutionalist account does not refute traditional political economic cost-benefit analyses of the decline of mercenarism but identifies some missing elements. Besides the fact that mercenaries are not *a priori* more expensive than conscripted soldiers – who not only need training, public provisions (housing, education, health services) and administration; but also imply a loss of economic manpower - Thomson (1990: 32-33) calls into question the role of nationalism in the economic argument. She asserts that this argument suffers from a conflation of the concepts of ‘state’ and ‘nation’ because “individuals and nations do not decide what wars to fight; states do” (Thomson, 1990: 32). As such, nationalism might not always be a sufficient motivator to fight wars decided by states (Thomson, 1990: 32). Admittedly, conscription could generate a larger and more loyal army (and can therefore not be depicted as irrational); but the obvious political advantages of mercenaries cannot be negated. They include greater latitude for states in war-making, because mercenary casualties are not as politically sensitive. On the basis of these arguments, the near elimination of mercenary activities strikes

Thomson (1990: 33) as somewhat premature.

In fact, this is where a sociological institutionalist argument comes into the picture. To understand this argument, we must not conceptualise mercenaries as sellers of military labour (being a commodity on the international market). Rather, they should be seen as individuals “exercising violence in the international system” to militarily enforce a political cause (Thomson, 1990: 33-34). This reconceptualization of mercenarism from an economic to a political phenomenon entails a refocus of attention from an economic cost-benefit analysis to an analysis of institutionalised governance practices steering the exercise of legitimate force in the international system (Thomson, 1990: 34). In this regard, the central institution is state sovereignty. Its main tools are the authority claims of states on violence originating from within their borders and affecting external actors (Thomson, 1990: 34).

Respect for state sovereignty requires other states’ neutrality in disputes that do not directly affect their national ‘survival.’ Neutrality is not objectively given, but consists, inherently, of an “intersubjective understanding, a set of expectations among statesmen about the proper behaviour of a neutral state” (Thomson, 1990: 40-41). A neutral state is a state whose policies are in line with this intersubjective understanding of neutrality, or with the practices that have customarily come to characterise a neutral state (Thomson, 1990: 41). The emerging nation states came to be held responsible for the actions of their citizens on the international scene. As such the disappearance of mercenaries can be seen as an “unintended consequence of interstate politics” (Thomson, 1994: 69). Only with the prior emergence and development of the nation state and its citizens did the conceptual difference between state violence and societal violence gain meaning (Thomson, 1990: 43) and did non-state violence become a problem. The emergence of the nation state required a double delineation of borders: the demarcation of state borders to differentiate insiders from outsiders, combined with the penetration of social life within those borders, the result of which was the “institutionalization of the boundary between the public political and the private nonpolitical spheres” (Thomson, 1990: 43). Regarding the demarcation of state borders, in a process of external exclusion, a sovereignty claim on a delineated territory is secured against claims of

external political rivals while the internal penetration of the nation state refers to the formulation of the relationship between a nation state and its citizens (Thomson, 1990: 43). Inherent in the development of citizenship is a delimitation of appropriate state involvement in the private life, viz. the differentiation of a private and a political sphere. Legitimate state involvement and its use of coercion is restricted to the public, political sphere and the state is barred from interfering in the private life of its citizens (Thomson, 1990: 43-44). The initial development of the notion of citizenship brought along practical questions regarding the place of a national citizen in the international system and, more specifically, regarding state accountability for the actions of its citizens abroad (Thomson, 1990: 44). The concept of citizenship not only implied a relationship between the citizen and its home state, but also between the citizens of different nation states and between citizens of one nation state and public authorities of another (Thomson, 1990: 44). According to Thomson (1990: 44), the attribution of citizenship to mercenaries and the consequential politicising of mercenaries transformed the “private decision to sell military labor on the international market into a public decision to deploy violence in the international system”. Concomitantly, sovereignty was redefined and accountability of state leaders for the conduct of their citizens abroad was established. In other words, “[t]he nineteenth-century system excluded violence from the list of individual activities over which statesmen could legitimately disclaim authority, and therefore, responsibility. Violence was taken off the market” (Thomson, 1990: 44). The US have been a trendsetter in this regard, as they were the first liberal republican state to frame mercenaries’ enlistment in foreign armies as contradictory to US citizenship (Thomson, 1990: 42). Other states followed this lead.

This sociological institutionalist account does not completely refute the previous arguments, since it might be argued that states benefited from the development of this norm and that increasing state reluctance to authorise non-state violence did not necessarily contradict state interests.<sup>15</sup> While states undoubtedly benefited from the authorisation of mercenaries, privateers and mercantile companies, they also suffered numerous problems. However, while other

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<sup>15</sup> In Percy’s (2007a) account, on the contrary, states act upon a norm even if they are aware that it is not in their direct interest.

options to reign in the excesses of non-state actors without completely eliminating them were on the table,<sup>16</sup> state leaders' "common interests in building state power vis-à-vis society produced an international norm against mercenarism" (Thomson, 1994: 88). The norm thus reflects state interests and facilitates interstate relations.

### 2.3 Change in Morality

A constructivist account accords even more importance to the role of norms in shaping the composition of national armed forces in the international system. This normative explanation acknowledges the development of the concept of a citizen and his duty towards the state, but prioritises the moral aspect of the decision to switch to citizen armies. In this argument, norms supersede the rational calculation of state behaviour. Percy (2007a) argues that the normative taboo on the use of mercenaries eventually became insurmountable for states that turned towards their own citizens as a replacement.<sup>17</sup> The anti-mercenary norm consists of two components. On the one hand, the immorality of mercenaries lies in how they escape legitimate control on their use of force. On the other hand, it derives from their selfish, purely financial motivation, with which they replace morally higher valued motivations such as "the common good" (Percy, 2007a: 1). While the translation of this anti-mercenary norm into international law has incontestably been rather weak (Percy, 2007b), this has not obstructed the norm from shaping the contemporary organisation of military force. Percy (2007a: 122) traces the process of the disappearance of mercenaries in the cases of America, France, Prussia and Great-Britain. She concludes that it can only be attributed to the norm against mercenaries - going back to at least the twelfth century - in combination with emerging "normative beliefs about the nature of the state and of its military organization". Connecting these cases is an underlying transformation of the relationship between a subject and the state. Echoing previous analyses, emerging concepts such as

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<sup>16</sup> At the beginning of this process, a complete abolition of non-state violence did not stand out as the only option. Another option was to regulate certain forms of non-state violence more tightly (Thomson, 1994: 75, 82-83).

<sup>17</sup> Percy (2007a: 24) follows a constructivist notion of a norm as "a rule or standard of appropriate behavior that an actor accepts as part of his identity and follows most of the time".

the 'citizen', his duty to the state, and the accompanying patriotic and nationalistic motivations to fight for the state pushed away the traditional mercenary, with his "morally inappropriate and practically inferior" motivation (Percy, 2007a: 121).

Percy (2007a: 121-123) argues that her norms-based approach remedies three gaps in the previously discussed stories. First of all, she argues that Thomson and Avant (to be discussed below) focus on the theoretical and practical transformations of the relationship between the citizen and the state, but disregard the moral element of this new relationship. For Percy (2007a: 121-123) only the combination of this moral element, together with the variations in citizen-state relationships in different countries, can elucidate the variation in state practices and in the timing of this shift in different states. Secondly, building on this normative aspect, Percy (2007a: 122) asserts that practical obstacles surrounding mercenaries were not impassable, but that a citizen army was considered morally superior because it carried implications for the state: "if citizens were willing to die for their state, it suggested that the state was a powerful and glorious entity that took care of its people, who returned the favour". This reciprocity was absent in the case of mercenaries but contributed to an internationally respected status, which is why citizen armies gradually developed into a feature of state identity. Thirdly, Percy addresses the question why the citizen army stayed the preferred military option, even when, after the revolutionary era, political leaders tried to re-instate pre-revolutionary military practices.

Although the cases under review exhibit striking similarities in their reconfiguration of the state-citizen relationship, domestic political factors are indispensable to account for national singularities. In both the American and the French case, a revolution occupied centre stage in the manifestation of the anti-mercenary norm. America and France are similar to the extent that they "adopted a citizen army as an organic part of a revolutionary ideology which precluded the use of foreigners and reinforced the existing intellectual tradition suggesting that mercenary use was problematic". Since both countries were early adopters, they had no examples on which to base themselves, suggesting that this decision was not a cost-benefit analysis, but rather a leap of faith. The

republicanism carried out by the American revolutionaries affected and reconfigured the relationship between the citizen and the state. The emergence of this idea of citizenship came with its rights and duties for the citizen. What is more, in fighting for the state, the citizen not only fulfills his duty to the state, but also secures his own freedom - which is not the case when hiring mercenaries (Percy, 2007a: 124). The motivation of a citizen soldier was thus morally superior to that of a mercenary. However, as indicated above, citizen armies did not guarantee a practical advantage over traditional mercenary forces, on the contrary. Even if potentially more efficient, the normative dislike of mercenaries and the moral superiority of citizen soldiers were crucial causal factors for the demise of mercenary armies (Percy, 2007a: 126-128). The Republican normative underpinning of the American Revolution required the citizens to contribute to the war effort (Percy, 2007a: 126-127):

American revolutionaries, having trumped the belief that in fighting for their nation citizens preserved their own liberty and the ultimate freedom of the country itself, could only associate the use of mercenaries with the barbarity of states clinging to old ways. If the Americans saw themselves as free and civilized not only because of their cause but because of the way they used citizens to fight for it, then it is not surprising that they saw the British as barbarians tightening the shackles of tyranny.

Similarly, French Enlightenment thinkers provided the breeding ground for a reconfiguration of the relationship between the state and its subjects, who now became citizens. Rousseau's promotion of "patriotism, civic virtue and republicanism" underlies the new French relationship between citizens and the state (Percy, 2007a: 128-129). Implicit in the citizen identity is the moral obligation to defend the state. The liberty of the people is endangered by leaders hiring mercenaries because, due to their lack of an appropriate relationship with the state, mercenaries serve state leaders instead of the polity itself (Percy, 2007a: 128-129). While mercenaries can be used by state leaders to oppress their citizens, a citizen army might be expected not to turn against its fellow citizens, making it a safeguard against tyranny (Percy, 2007a: 130). The

*levée en masse*, instigated in 1793, legally anchored this new relationship between the state and its citizens. Percy (2007a: 130-136) argues that this normative reconfiguration was so profound that, during the reactionary period after Napoleon - despite some material arguments in favour of a resort to mercenaries - the French stuck to their idea that a national citizen army was the best option.

In contrast to the American and French cases, Prussia and Britain did not experience a revolution, but this did not prevent them from reformulating the citizen-state relationship. Also in the Prussian case, a new relationship between the citizen and the state came to redefine the composition of the armed forces. However, this case is somewhat deviant since the reforms were inspired by the catastrophic 1806 defeats at Auerstadt and Jena, against Napoleon, and by the American Revolution. Both defeats proved to be turning points in Prussian public opinion towards mercenaries (Percy, 2007a: 139). Prior to them, mercenaries made up a significant proportion (one third to one half) of the armed forces. They were not generally disapproved of, as they allowed Prussian subjects to pursue their economic interests (Percy, 2007a: 136). The reformers framed the debate on the causes of the defeat of the Frederician army in ideological terms and concluded that the moral superiority of citizen soldiers would prove a practical advantage (Percy, 2007a: 139). Due to the strong links between the old army and old regime Prussia, the social reforms following those defeats are to be interpreted as preconditions for military reform (Percy, 2007a: 139-140). This facilitating social reform viewed citizens as a valuable asset to the state, that was in turn ready to grant its citizens more liberal freedoms, with the idea that “[i]mproving society to improve citizens would create better soldiers, better aware of their duty to the state” (Percy, 2007a: 141). Percy (2007a: 142) stresses the moral component of the transformation from a subject to a citizen: contrary to a subject, a citizen has the moral, civic and patriotic duty to defend the community, which contrasts with a mercenary, who is primarily motivated financially. Conservative voices in Prussia argued that mercenaries could be trained and professionalised to such an extent that they could stand up to French standards; with the additional advantage that they would not form a revolutionary breeding ground against the ruling class (Percy, 2007a: 143). Add to this the nearly universal social opposition against the military transformation



and the “huge social costs” it predicted (Percy, 2007a: 145) and the abandonment of mercenaries might not have been the most cost-efficient and practical solution to draft an army. In spite of these objections, the redefined relationship between the citizen and the state became part of the Prussian identity. It explains the instigation of a citizen army, in spite of conservative opposition and seemingly huge material costs (Percy 2007a: 145-148). However, this reconceptualization was not modelled on the revolutionary and Enlightenment examples, but aimed at “social discipline: a *levee en masse* rendered safe for the consumption of liberals and conservatives alike” (Moran, 2003: 5, cited in Percy, 2007a: 147).

Britain proves the hardest case to explain from a constructivist orientation, since it was only after the Crimea (1853-1856) that it decided to turn to a citizen army. Percy explains this ‘delay’ by reference to the competition between two norms: the norm against mercenary use versus the norm against standing armies. Discussion on the morally appropriate motivation of the army certainly existed prior to the Crimea and the idea that citizen armies might have been morally preferable to mercenaries gained some popularity (Percy, 2007a: 150). However, the English civil war had demonstrated that “royal control of standing armies was associated with the denial of civil liberties” (Percy, 2007a: 150). In the late seventeenth century, the cultivation of this distaste resulted in a norm against standing armies, which led Britain to rely on temporary mercenary armies, resulting in *ad hoc* military arrangements and concomitant recruitment problems (Percy, 2007a: 151). Normative debates already surrounded the significant proportion of mercenaries in the British army to combat the American Revolution and resurfaced “more vehemently” in the build-up to the Crimean War in the form of three normative concerns (Percy, 2007a: 152, 156-163). First of all, foreign mercenaries were considered to lack the appropriate motivation to fight. Secondly, parliamentary debates brought up the issue that hiring mercenaries was trading in flesh, which was considered immoral (an argument reinforced by the anti-slavery movement). Thirdly, the splendour of the British nation was considered to be undermined by the hiring of foreigners, not in the least because the greater number of troops raised by the French (through conscription) reduced Britain to a “junior partner” (Conacher, 1987: 110, cited in Percy, 2007a: 161). Wellington’s victory at Waterloo (obtained with a largely

foreign army) and the relatively long subsequent period of European peace pushed this debate to the background, but the Crimean War proved to be the last war in which Britain relied on mercenaries (Percy, 2007a: 163). The British norm against standing armies forced Britain to rely upon *ad hoc* recruitment strategies until the Crimea. Afterwards, the

moral outrage at the spectacle of using foreigners with no interest and therefore no natural motive to reinforce British troops helped contribute to the sense that the Crimea was a debacle, and that Britain could no longer claim to be a glorious state if patriotism could no longer earn her enough troops to fight. Continuing to use mercenaries was incompatible with the kind of state Britain was, and wanted to appear to be (Percy, 2007a: 164).

While Percy mentions domestic power struggles, she frames these struggles in normative terms. These norms undeniably form part of the power struggle, but Percy's account tilts towards a normative bias and fails to take into account that actors can aim to manipulate norms to achieve deeper lying goals. In contrast, Avant investigates who wins and who loses in this struggle of ideas and norms. As such, she pays more attention to the norm entrepreneurs and their position in society.

## 2.4 Change in the Power of Domestic Coalitions

Against realist and sociological institutionalist accounts, Avant (2000: 42) objects that "[s]mall professional armies, with no restrictions on mercenaries, also won wars and fit with predominant ideas". In Avant's (2000: 42) view, material and ideational factors must be considered antecedent conditions, acted upon by domestic coalitions, who in turn make use of international models that seem successful in similar circumstances. This 'mechanism' accounts for some path dependency in the explanation of military change. Population growth required states to expand territorially, to look for technological innovations, and to organise their armies more efficiently (Avant, 2000: 44). Ideational changes

formed the antecedent conditions for military change. The emergence of Enlightenment ideas and the development of natural law, of the social contract and of the notion of the citizen implied in that contract, provided a model to frame material issues (Avant, 2000: 44). In and of themselves, these material conditions are insufficient to explain the popularity of citizen armies. Professional armies consisting of mercenaries would have fitted better with the technological circumstances of the time, and with the ideas of professionalism and rationalisation propagated by Enlightenment thinkers and many eighteenth century army officers even preferred this type of military organisation (Avant, 2000: 45-48). What is more, ideas do not emerge spontaneously and need mediation to apply to a particular case. Enlightenment ideas could steer military reform in different directions because “these ideas were not a straightforward package. Professionalization and rationalization were often in tension with democratic processes” (Avant, 2000: 46).

Avant (2000: 42) largely accepts the normative and ideological arguments presented above but moves beyond them to include the notion of power. Her theoretical framework consists of a combination of the realist and sociological accounts and considers military change as a two-step process. First, an external shock, often a military defeat or a revolution, provides political entrepreneurs with the opportunities to call into question established institutions. These shocks can cause power shifts and “open minds to new alternatives, affect the legitimacy of institutions, and shatter worldviews” (Avant, 2000: 48). They can undermine or delegitimise institutions, but seldom affect change as such. Change occurs in the second step, when actors make use of ideas to construct alternatives. This can lead to the construction of focal points if these ideas are shared by a significant number of people (Avant, 2000: 49). Although focal points might emerge spontaneously, they can also be constructed. It is here that power comes into play. Since a change in dominant ideas often entails a change in “distributional consequences” not all ideas are equally likely to reach dominant status. Instead, Avant (2000: 42) analyses that new ideas are most likely to break through when dominant domestic coalitions are divided on an issue, and when they don’t foresee a significant undermining of their dominant position. The more the ideas and interests of the dominant coalition are dispersed, the more they are likely to inspire the successful construction of

a coalition around new ideas (Avant, 2000: 48-49). The loss or gain of power by specific actors in the construction of certain solutions thus becomes a key explanatory variable. The reaction to an external shock will depend on the distribution of power in the dominant coalition. If perceived as a threat to the interest of the dominant coalition, the reaction will probably be conservative (Avant, 2000: 51). However, “[w]hen an external shock is joined by a disjuncture in the dominant coalition - either a split in how they see the world or few common interests - it is more likely that a constructed focal point based on new ideas will take hold” (Avant, 2000: 51). To explain the framing of new ideas after an external shock, Avant invokes path dependency. Material and cognitive sunk costs are often the reason why an initial outcome is frequently preferred over other potential options in later stages of the adoption process or by later adopters (Avant, 2000: 51). International models are instrumental in promoting reform in other states, since they provide experimental examples.

Applied to the cases of France, Britain and Prussia, Avant considers the Napoleonic wars as a starting point for reform in other countries.<sup>18</sup> She (Avant, 2000: 52) asserts that Prussia opted for a citizen army following the lessons of the French Revolution, and that other countries in turn imitated the Prussian example. After an external shock - which was a military defeat in all of the cases mentioned - reactions depended on the solutions offered, but even more on how these solutions affected the interests of political elites (Avant, 2000: 52). The responses to those defeats depended on the domestic power coalition and were conservative if that coalition “shared a worldview and stood to benefit from the status quo” (Avant, 2000: 52). However, when these conditions were not fulfilled, an alternative solution could be constructed by actors who benefited from that new way of thinking (Avant, 2000: 52). Without elaborating on the empirical details of Avant’s research, the following quote illustrates her argument:

We should not look to domestic conditions to explain only the margin of variance as realists and sociologists do. Without the Prussian interpretation of the battles of Jena and Auerstadt as demonstrations of the superior fighting capability

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<sup>18</sup> In contrast, Thomson reserves this position for the American Revolution.

of citizens, the path toward small professional armies might not have been abandoned. [...] If Prussia had not moved to a mass army, perhaps other countries would have learned different lessons from the Napoleonic Wars (Avant, 2000: 69).

In Prussia itself, Old Regime rulers proved the critical 'mass.' Once they were convinced that a citizen army proved capable of winning wars without destabilizing and threatening their own dominant position, the road to the adoption of a citizen army in Prussia and in other countries was opened (Avant 2000: 67).

Domestic power struggles thus play a central role in Avant's theoretical model and in all the cases reviewed. A key question now is: whose interpretation is accepted as the "official interpretation" because, frequently, there are multiple reasons for defeat in war and multiple ways to remedy them (Avant, 2000: 59). On its own, neither a realist, nor a constructivist argument suffices to account for the nature and timing of the shift towards citizen armies. Comparing these arguments makes clear that they all carry some part of the explanation; and that it is only in combining these arguments that we can make sense of the overall story. Avant takes a first step in combining these explanations. The antecedent conditions normative struggles are embedded in, she argues, cannot be overlooked, since they shape the domestic and international distribution of power. For an international norm or practice to gain a foothold, it must have been promoted by a domestic coalition (of norm entrepreneurs), who mostly have something to win by doing so. However, once a new practice becomes internalised and reaches the status of a norm, it becomes part of the state identity and a guiding principle of state behaviour. Nevertheless, there still remain some unanswered questions. First, in this domestic power struggle, why do some groups gain an advantage over others with alternative ideas? Can this purely be attributed to differences in material power? This would imply that norms are only a façade for the diffusion and naturalisation of the outcome of a power struggle. Norms, in this argument, are a method used by strong power coalitions to consolidate their rule. This fits uncomfortably with evidence of the fact that strong powers follow norms, even if this appears to contradict their self-interest. This conception would also undermine the established constructivist

research tradition this text is embedded in. Therefore the challenge of the following chapters is to make explicit how normative change comes about and which actors most decisively impact it.

### **3. Constructivist Style of Reasoning**

In many studies on the private military and security industry, the absence of an explicit theoretical framework leaves open “space for important analysis” (Percy, 2007a: 3). Such a framework can guide the researcher in describing problematic aspects of rivaling accounts of a phenomenon under study. Conversely, empirical testing might uncover the shortcomings of a particular theory. This chapter therefore elaborates on the constructivist “style of reasoning” (Pouliot, 2007) that underlies this study. If one accepts the claim of Price and Reus-Smit (1998: 264) - as I do, with the reservations discussed below - that constructivism is a new phase in the development of critical theory, the following step is to devise the conceptual apparatus necessary to deliver on this promise. Constructivist theorising has drawn up models to describe and analyse norm change. These models are unsuccessful in fully grasping the breakdown of the prohibition on non-state violence and the emergence of legitimate non-state wielders of coercion. The reason for this is twofold. First, these models still suffer from an inadequate recognition of the role of power in norm negotiations. Norm negotiations do not usually take place among equally powerful actors. This weakness in constructivist theory is the outcome of a fear to step across paradigmatic boundaries. At this stage, in line with the conclusions of the previous chapter, I will argue that only a purposive combination of realist and constructivist reasoning offers the theoretical refinement to make sense of the current period of normative turmoil. This argument finds its expression in the presentation of a heuristic tool that aims to disentangle cycles of norm change and individual contributions to the normative debates. This heuristic tool corresponds to an eclectic model of norm change. Its utility is illustrated in the last two chapters, where it will guide the empirical analysis of this research. Evidently, this is only a preliminary application of this analytic tool and its usefulness can only be substantiated through further research in other areas of international relations. In the following, section 3.1 develops the constructivist style of reasoning while the differences with competing styles will be highlighted in section 3.2. Section 3.3 discusses existing models of norm change, after which the fourth section will present the eclectic model of norm change informing this study.

### 3.1 Constructivist Style of Reasoning

Since the constructivist turn in international relations theory - at the end of the 1980s, early 1990s (Checkel, 1998) - scholars have demonstrated the effect of norms on the behaviour of states. Studies undertaken from a constructivist point of view elucidate how state behaviour is governed by the identities of those states and by the norms in place at a given moment in time. By emphasising these elements, constructivist scholars address what they consider to be ignored by neorealist and neoliberal research, namely “the content and sources of state interests and the social fabric of world politics” (Checkel, 1998: 324). Although (neo)realism is not at all a single theory, different variations of this theoretical position do agree that humans are inherently egoistic (Wolforth, 2010: 133). This egoism forms the basis of the self-interest underlying the (political) acts of individuals and groups (Wolforth, 2010: 133). In this view, egoism is the source of state interests and “the intersection of groupism and egoism in an environment of anarchy makes international relations [...] largely a politics of powers and security” (Wolforth, 2010: 133). In reaction to these assumptions, constructivists assert that the interests of states are not given *a priori*, but change over time, due to the socialisation of those states, the acceptance of new norms and values, and the redefinition of interests following from that socialisation (Finnemore, 1996: 5). Constructivist research projects have demonstrated how, in the area of war and warfare, norms have proved relevant in constituting guiding rules and even limits on the use of certain forms of military force (e.g. Finnemore, 1996, Katzenstein, 1996, Price, 1997, Barnett and Finnemore, 2004 and Percy, 2007a). These studies have confirmed Finnemore’s (1996: 4) proposition that the neorealist description of war is incorrect: instead of a Hobbesian state of nature, “war is a highly regulated social institution whose rules have changed over time”. One of these regulations forbids the use of mercenaries in an armed conflict<sup>19</sup> as part of a wider

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<sup>19</sup> The Organisation of African Unity (OAU) Convention for the Elimination of Mercenarism in Africa, dating from 1977, tried to eliminate mercenarism in the context of African decolonisation (Schreier and Caparini 2005: 147). A second Convention, equally dating from 1977 consists of Article 47 of the 1977 Protocol I Additional to the Geneva Conventions (of 1949). The main objective of this Protocol consists of a definition of the legal status of mercenaries in international law and their position in international humanitarian law (Schreier and Caparini, 2005: 148). The more recent UN International Convention against the Recruitment, Use, Financing, and Training of



outlawing of the use of force for private gain.

Although it has undoubtedly broadened the landscape of international relations (Checkel, 1998: 325), the variety of definitions to circumscribe constructivism indicate how scholars of international relations theory are still debating its place in this academic field. Adler (1997: 323) thinks of it as a “social theory on which constructivist theories of international politics are based” instead of as a narrowly defined theory of politics. This author (Adler, 1997: 322) sees constructivism as the middle ground between rationalist and relativist interpretative approaches. This claim is echoed by Checkel (1998: 325), who does not consider constructivism to be a theory of international relations *an sich*, but “an approach to social inquiry”. In this line of thought, Guzzini (2000) speaks of constructivism as a reflexive meta-theory. This text follows Pouliot’s (2007) vision on constructivism as a “style of reasoning” in social science. Pouliot (2007: 361) recalls the work of philosopher of science Ian Hacking, who coined the notion “style of reasoning” and uses it to describe constructivism as a “historically constituted episteme”. For Pouliot (2007: 361) constructivism brings with it a new ontology, a new epistemology and a new methodology and thus satisfies the three criteria of a style of reasoning proposed by Hacking. Taking these criteria into account, Pouliot (2007) considers constructivism a post-foundationalist style of reasoning.

Although they are not undivided on the kind of theory social constructivism is, scholars working in this tradition agree on the basic principles forming the core of constructivist ‘reasoning.’ Usually, three ontological propositions are invoked (Price and Reus-Smit, 1998: 266), inspired by the sociological and interpretive turns in the social sciences (Guzzini, 2000: 149). In light of these turns, Pouliot (2007: 362) problematizes the distinction between a constructivist epistemology and ontology, which, in his view, are only divided by a ‘slash’. First of all, constructivists maintain that “material facts acquire meaning only through human cognition and social interaction” (Finnemore, 1996: 6). They acknowledge the existence of a phenomenal world, independent of thought, but also deny

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Mercenaries, dates from 1989 but only entered into force in 2001.

that phenomena can constitute themselves as objects of knowledge independently of discursive practices. In other words, phenomena can exist independent of thought, but they can not be observed independent of language. What counts as a socially meaningful object or event is always the result of an interpretive construction of the world out there (Guzzini, 2000: 159).

Constructivists thus present a critique of the materialism and methodological individualism underlying much neorealist and neoliberal theorising (Checkel, 1998: 325). Important to note is that the interpretive construction of the world is the result of a structure of shared knowledge (Wendt, 1995: 73). As such, an intersubjective social context is necessary to allow meaningful behaviour (Hopf, 1998: 173).

Secondly, not only the phenomenal world, but also social reality is “constructed instead of exogenously given” (Pouliot, 2007: 362). This entails that, according to constructivists, neorealists and neoliberals are wrong in consciously bracketing the interest of states, because interests and the actions flowing from those interests are constituted by the identities of states (Price and Reus-Smit, 1998: 267). These identities - described by Wendt (1992: 397) as “relatively stable, role-specific understandings and expectations about self” - are inherently relational and are acquired by participating in collective meanings. In this way, identities are socially constructed through interactions with other actors and are ultimately determined by the intersubjective structure (Hopf, 1998: 175). They inject a sense of predictability in a society because they “tell you and others who you are and they tell you who others are” (Hopf, 1998: 175). State identities are multiple and are not fixed but can vary over time (Wendt, 1992, Hopf, 1998). Hopf’s (1998: 173) assertion that the relations between actors, and consequently their understandings of each other, are mediated by norms and practices will be discussed below.

Thirdly, from a constructivist point of view, agents and structures are mutually constituted and mutually constitutive (Hopf, 1998, Wendt, 1992). Neither

ontologically precedes the other (Checkel, 1998: 326). While the conceptualization of structures is still debated in contemporary international relations theory, they can be understood as “a set of relatively unchangeable constraints on the behavior of states” (Hopf, 1998: 172). In the transformational model, structure is understood as “a set of materials that is ‘appropriated’ and ‘instantiated’ in action” (Dessler, 1989: 452). These social forms pre-exist action but, at the same time, social structure presupposes social action (Dessler, 1989: 452).

Later constructivist research (Guzzini, 2005, Pouliot, 2007) has stressed the reflexivity “between the social construction of knowledge and the construction of social reality” in which both can affect the other and can thus create looping effects (on the micro-level) or self-fulfilling prophecies (on the macro level) (Guzzini, 2005: 498-499). In this regard, naming and classifying people also influences their self-conception (looping effects); and an idea can manifest itself prominently, if we collectively believe that idea is a good description of a certain issue. (Guzzini, 2005: 498-499). More explicitly, Pouliot (2007: 363) asserts that “[t]he world (ontology) and knowledge (epistemology) are mutually constitutive processes”.

### 3.2 Links with other Styles of Reasoning

Immediately after the constructivist turn, scholars tried to demonstrate the differences between constructivism and more traditional approaches to international relations theory. These theories were divided between rationalist and interpretive epistemologies - the former including (neo)realists and neoliberal institutionalists; the latter consisting of postmodernist and poststructuralist theories, critical theory and feminist theories (Adler, 1997: 319-320). More recently, scholars have argued against this paradigmatic castle-building (Barkin, 2011). Instead, they started offering suggestions to overcome the gaps between those paradigms by stressing their similarities. Earlier, Price and Reus-Smit (1998) had already argued that the division between critical theory and constructivism is not so deep as traditionally assumed. Their argument amounts to the claim that constructivism is not contradictory to key findings of Third Debate critical theory and that constructivism even has its roots

in that critical theory, using its conceptual and theoretical as well as its methodological findings to design a distinct approach to international relations (Price and Reus-Smit, 1998: 260). Price and Reus-Smit (1998: 260) even go one step further, elucidating the contribution of constructivism to the development of critical international theory, in particular regarding the “sociology of moral community in world politics”. These authors (Price and Reus-Smit, 1998: 264) argue that constructivism can be considered a new phase in the development of critical theory, taking up conceptual elaboration and empirical analysis often neglected in critical theory. Price and Reus-Smit (1998: 270-283) examine how constructivists cope with meta-theoretical insights of critical theory and how they translate these insights into empirical claims. The first insight concerns the use of evidence and the limits of interpretation. In this respect, the authors claim that constructivists are not violating the interpretive ethos of critical international theory more than those theorists themselves are doing. Given the fact that constructivists maintain it is impossible to escape the interpretive moment; they reject ‘Big-T’ Truth claims, while nevertheless making ‘small-t’ truth claims, or “logical and empirically plausible interpretations of actions, events or processes” (Price and Reus-Smit, 1998: 272). In line with Pouliot’s conceptualisation of constructivism as a post-foundationalist style of reasoning, these interpretations are always partial and contingent and thus do not violate critical theory’s interpretive ethos (Price and Reus-Smit, 1998: 272). Regarding law-like generalisations, secondly, Price and Reus-Smit (1998: 275) make a similar point, claiming that a rejection of law-like generalisations does not prevent the formulation of more contingent generalisations. These are not contradictory to those made by critical theorists. Thirdly, Price and Reus-Smit (1998: 280) address the question of alternative explanations and interpretations. They assert that, independent of the theoretical framework underlying an account of the world, these accounts are all partial and can only clarify “aspects of an event or phenomena that are required for an adequate understanding of the explanandum in question”. In short, Price and Reus-Smit (1998: 288-289) do not fully accept the term ‘constructivist turn’, but instead argue for a conceptualization of constructivism that is a “logical continuation” of Third debate critical theory. By engaging the mainstream, and by addressing the four above-mentioned issues, constructivists have distanced themselves from their origins in critical international theory; but their epistemological, ontological and

methodological foundations are not inconsistent with that origin.

Price and Reus-Smit have concentrated on the compatibility of constructivism with the meta-theoretical foundations of critical international theory. Sørensen (2008: 6), in turn, maps the debate between neorealism and social constructivism. He proposes an analytical eclecticism in which both material and ideational factors are included in the study of international relations. Doing this, Sørensen (2008: 10) responds to the assertion by Kowert and Legro (1996) that intersubjective knowledge and the norms resulting from that knowledge do not exist in a material vacuum. I agree with Sørensen (2008: 13) that, even in light of the foregoing debate, an account combining material and ideational factors should not necessarily be ontologically or epistemologically inconsistent. Several authors have taken up this challenge (Zacher and Matthew, 1995, Buzan, 2004). For his own proposal, Sørensen uses Cox's (1996) NeoGramscian notion of historical structures as a conceptual starting point. To the neorealist notion of international structure (being the relative distribution of material and military capabilities) and to the constructivist notion of international structure (emphasizing ideas and shared knowledge); Sørensen (2008: 14) adds a third notion consisting of economic power, or "the capability to design, construct, finance, and distribute economic goods". Taken together, these three structures represent an historical structure, as defined by Cox (1981: 135) as a "picture of a particular configuration of forces". Similarly, the previous chapter clarified how the explanation of change in military practice depends on changes in the material environment as well as in the (inter)national division of power determining the interpretation of those changes. The final chapter will demonstrate that normative power is facilitated by the availability of economic power.

However, in this text, I will not adopt the position of a Coxian critical theory analysis, but I will draw on Barkin's (2003, 2011) conceptualisation of a realist constructivism. Let me first clarify the relation between realist constructivism and critical theory before discussing realist constructivism in depth. Realist constructivism does show significant similarities with critical theory, but differs from it in one aspect: it does not contain the "element of utopianism" (Cox, 1981: 130) of critical theory. That is, it does not present an alternative to the

current world order. This fits my purpose since my aim is to uncover the power and interests distorting communication; but I do not take a “privileged” emancipatory position directed at the “removal or correction of these distortions” (Shapcott, 2008: 329-330). The major difference with a Coxian critical theory analysis is therefore meta-theoretical in that the claim of emancipation is absent in realist constructivism. Realist constructivism lacks the “commitment” to reconstruct the world and does not aim to use social theory as a “weapon for waging war on inequality and injustice in world politics” (Farrell, 2002: 59). For (realist) constructivists, the individual cannot be freed from the social structure, because only social interaction gives meaning to the world. The constructivist conception of social reality, in other words, “does not allow for the emancipation of the individual from social structures” (Barkin, 2011: 78-79). Emancipation is at the core of critical theory, but it also involves withdrawing the individual from the social structure, because to emancipate is to transcend power relationships inherent in social interaction - which is impossible for constructivists. Furthermore, there is no inherent predisposition in constructivism towards one particular social construction at the expense of another (Barkin, 2011: 79).

Barkin (2003: 326, 337) goes one step further than Sørensen. Not only does he argue that constructivist research is not incompatible with a realist worldview, but also that political change can not be explained by drawing exclusively on realist or idealist factors. In Barkin’s (2003: 327-329) argument power is the central concept in classical realist theory and the other central concepts in this theory ultimately derive from this core. Realist constructivism is also concerned with this core since it scrutinises “the way in which power structures affect patterns of normative change in international relations and, conversely, the way in which a particular set of norms affect power structures” (Barkin, 2003: 337). Barkin’s proposal of a realist constructivism has instigated a debate on the compatibility of realism and constructivism. Most of Barkin’s critics agreed on the possibility of a realist constructivism, but contended that Barkin’s original proposal needed some refinement. Barkin (2011: 169) has taken these critiques into account in his refined version of realist constructivism but retains relational power politics as a central element. Realism offers a more comprehensive conceptualisation of power than is currently present in constructivism as well as another view on the relationship between empirical research and policy (Barkin,

2011: 169). Realist constructivism thus problematizes the relationship between political morality and power politics (Barkin, 2011: 170). More specifically, Barkin (2011: 171) states:

[Realist constructivism] is well placed to see that not only do discursive and normative structures tend to be constantly recreated, but that they often must be recreated against opposition, and that to recreate them to reflect a particular political morality can require the application of power as well as reason.

Realist constructivism differs from realism mainly because it considers self-interest and public interest, not as given *a priori*, but as intersubjectively constituted phenomena and subject to empirical investigation (Barkin, 2011: 69-70). Thus, contrary to realism, realist constructivism does not posit an egoistic human nature as the foundation of human behaviour. Realism and constructivism agree that human beings are a “social species” (Sterling-Folker, 2004: 342). For the former, this is why we form groups; for the latter, this is why we can only make sense of the world through interaction (Sterling-Folker, 2004: 342). Realist-constructivism, however, admits that, even if morality is socially constructed within a group, relative power relationships do shape ethical issues within and between groups (Sterling-Folker, 2004: 342). Power, in realist constructivism, can appear in a variety of ways. Economic power, for instance, differs from moral authority; as well as power “can be expressed in a multiplicity of fashions – for instance through material, symbolic, and linguistic means” (Mattern, 2004: 345). Depending on the “sociopolitical circumstances”, power can assume a different form and does not *a priori* structure reality (Jackson and Nexon, 2004: 340). Different forms of power exercise a different influence on international politics. As a result, the researcher should analyse how actors use these different forms of power to construct alternative social realities (Mattern, 2004: 345).

In general terms, social power is an actor’s ability to intentionally steer the conduct of other subjects in the social world, through the use of causal mechanisms he/she has at his/her disposal (cf. Scot, 2001: 1-2). For Lukes

(2005: 27) the “supreme exercise of power [is] to get another or others to have the desires you want them to have”. Likewise, I consider the potential to shape intersubjective understandings as the ultimate dimension of power. Power, in the realist-constructivist sense used in this text, refers to this ability to shape intersubjective meanings and understandings, including norms. Realist constructivist power corresponds to what Barnett and Duval (2005: 3) call “productive power”.<sup>20</sup> Productive power is the “constitution of all social subjects with various social powers” and is exercised through the discursive production of meaning (Barnett and Duval, 2005: 20-21). This discursive production not only results in various identities, interests and capacities, but also defines what counts as possible or impossible, legitimate or illegitimate paths of action (Barnett and Duval, 2005: 20-21). Norms and discursive structures thus shape and generate “differential social capacities” (Barnett and Duval, 2005: 3), but are themselves (re)created by social agents. As part of a broader episteme, norms both constitute and are produced by agents and by their social interaction (Adler and Bernstein, 2005: 297-298). However, the exploration of this theme will be postponed to the last section of this chapter.

### 3.3 Normative Change

Meaningful behaviour presupposes an intersubjective social context, which in turn is constituted through the “media of norms and practices” (Hopf, 1998: 173). In this text, norms will be understood as a collectively held standard of appropriate behaviour which actors follow most of the time because of reasons relating to their identity (Florini, 1996, Percy 2007a: 17). Despite it taking a central position in constructivist reasoning, the constructivist study of norm change is still rather limited. Constructivists frequently take norms for granted as an *a priori* condition steering the conduct of states. They focus on the continuity rather than on the change of existing norms. While studies on a potential change in the state monopoly on violence have been conducted (Krahmann, 2009, Percy, 2007a), there is room to complement these studies

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<sup>20</sup> For Barnett and Duval (2005: 3), productive power is one “expression” of power, next to three other expressions: compulsory, institutional and structural power. I will not contradict that each of these expressions functions in a distinctive way. However, I consider them to be different dimensions of constructivist power, that is, they facilitate the production of meaning and significance.



with a more formalised theoretical model of norm change. Such a model not only offers opportunities to advance the theoretical insight in international relations, but it can also act as a heuristic tool to trace the formation of state interests.

This section presents three existing models of norm change. All three provide helpful insights into the mechanisms that underlie normative change, but overlook a crucial element, namely the role of power in calling into question old norms and constructing new ones. In this respect, the previous discussion made clear that explicit attention to the material distribution of resources and to patterns of power in international relations can help forward constructivist scholarship. The incorporation of such a dimension of power can be seen as an addition to the existing frameworks. It is not a complete rejection of those proposals.

As Sandholtz (2008) points out, normative structures do not and can not stand still. This is due to the fact that, no matter how meticulously elaborated a system of rules; there are always unforeseen circumstances that cause disagreements over existing rules or over which rules to apply in a given context. Sandholtz (2008: 105) refers to Hart's (1994: 123) classical formulation of the problem that there inevitably is a "duality or a core of certainty and a penumbra of doubt when we are engaged in bringing particular situations under general rules. This imparts to all rules a fringe of vagueness" open to interpretation. This movement in normative structures has been conceptualized differently by different authors. Three of these models will now be highlighted.

Finnemore and Sikkink (1998) have made several contributions to the debate on norm dynamics. These authors (Finnemore and Sikkink, 1998: 888) propose a life-cycle model of norms in which the different stages are dominated by different behavioural logics.<sup>21</sup> They argue that the division between rationality and norms is not as deep as traditionally assumed. Stubbornly holding on to that opposition even obstructs the explanation of "strategic social construction" in which actors strategize rationally to reconfigure preferences, identities, or

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<sup>21</sup> The main characteristics of this model were already present in Finnemore's (1996) study of national interests in international society.

social context” (Finnemore and Sikkink, 1998: 888). In other words, norms and rationality are inextricably linked. To separate them would hamper the explanatory power of a particular account (Finnemore and Sikkink, 1998: 888). I will later return to this strategic social construction. The “life-cycle” Finnemore and Sikkink (1998: 895), talk about is characterised by a three-stage process in which the “norm emergence”, if reaching a tipping point, is followed by a broader norm acceptance, (labelled the “norm cascade”); while the final stage involves the internalisation of the norm.

Finnemore and Sikkink (1998: 896) assert that norms do not “appear out of thin air”, but are constructed by norm entrepreneurs “having strong notions about appropriate or desirable behavior in their community”. An important component of this norm emergence is the framing of issues in a language that attracts the attention of the broader public and that offers an interpretation of these issues (Finnemore and Sikkink, 1998: 897). However, in later research, Payne (2001) argued against the importance of framing as the cause of norm change. Just like norms do not emerge out of thin air, they also do not enter “a normative vacuum” but a space of competition between already existing norms and interests (Finnemore and Sikkink, 1998: 897). When Finnemore and Sikkink (1998: 898) analyse the motives of the actors involved in the process of the norm cycle, they consequently consider “empathy, altruism, and ideational commitment” as a crucial motivations. They add that these entrepreneurs usually do not act against their own interests, rather they redefine their perception of interests accordingly. To promote their norms, furthermore, entrepreneurs need an organisational platform - often found in the form of an international organization - which provides the expertise and information needed to give credibility to the norms (Finnemore and Sikkink, 1998: 899).

The second stage of the life-cycle, the norm cascade, commences when a tipping point is reached, viz. when a significant number of states have adopted the new norm, including some critical states (Finnemore and Sikkink, 1998: 901). The authors argue that, after the initial tipping point, states are convinced to adopt the new norm by an active process of international socialization. In this process, states, networks of norm entrepreneurs and international organisations “act as agents of socialization by pressuring targeted actors to adopt new

policies and laws to ratify treaties and by monitoring compliance with international standards” (Finnemore and Sikkink, 1998: 902). Important in the argument of Finnemore and Sikkink (1998: 902) is that, in this stage of norm cascade, state behaviour is guided by their identity in international society. As we have seen, this identity is given form by the intersubjective, cultural and institutional environment. Finnemore and Sikkink (1998: 902-903) invoke insights of psychological and sociological research to back their claim that peer pressure among countries is what leads to the adoption of a new norm due to psychological mechanisms of legitimation, conformity and esteem. The third and final stage of the emergence of a new norm consists of the internalisation of that norm by actors who consider conformity with that norm as an almost automatic behaviour (Finnemore and Sikkink, 1998). In this respect, Finnemore and Sikkink ask themselves which norms are most likely to become established and under which circumstances this takes place. They conclude that the most important factors determining the success of a new norm are: the need for international legitimation on the part of states, its prominence in terms of its quality or the quality of the states promoting it, and its intrinsic characteristics (Finnemore and Sikkink, 1998: 906). The authors add that adjacency claims or path dependency as well as the specific world-time context (e.g. significant historic events) can influence the likeliness of norm emergence (Finnemore and Sikkink, 1998: 908-909).

Sandholtz (2008) and Sandholtz and Stiles (2009)<sup>22</sup> have proposed their own version of a cycle-theory to conceptualise norm dynamics. Working in the constructivist tradition, Sandholtz complements this tradition in four ways, of which the second and the fourth are most relevant for the present study. Firstly, Sandholtz (2008: 103-104) maintains that even rational agents are embedded in an environment of social rules and thus have to rely on normative reasoning. The ‘rational maximizer’ operates in a system of normative rule-structures that he or she has to take into account when making decisions. This does not mean that the maximizer can not break these normative rules, but, in doing so, he or she must provide normative reasons and arguments to justify those actions. Secondly, Sandholtz (2008: 103) tries to incorporate a more explicit notion of

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<sup>22</sup> The contributors to Sandholtz and Stiles (2009) provide the reader with historical examples of norm change.

power in the dynamics of norm change, albeit with little success. Furthermore, he (Sandholtz, 2008: 103) asserts that norm change is not generated by abstract reasoning, but arises out of practical disputes on specific actions. Finally, he shows that the cycles of norm change do not stand alone, but are linked in a longer, historical dynamic of normative change (Sandholtz, 2008: 103).

Reminding the model of Finnemore and Sikkink, Sandholtz (2008: 104) conceptualises the historical and geographical constellation of a normative environment as the first stage in a dialectical cycle of norm change. Hart (1994) has been cited above to indicate that “all normative structures generate disputes” (Sandholtz, 2008: 105), due to the incompleteness of those structures and their internal contradictions. This possibility of normative disputes is the second phase in Sandholtz’s cycle-theory of norm change. It is only in the third phase that disputes actually take place and that actors have to provide arguments to justify their actions. In such disputes, the rational maximizer has to convince other actors of the validity of his conduct. In other words, he must offer arguments to persuade the other relevant actors not to sanction him for this specific line of conduct (Sandholtz, 2008: 106). Sandholtz (2008: 106-107) maintains that the arguments provided for this justification benefit from consistency and analogy with past rules, from precedents and from the support of powerful states. Later in this section, these three mechanisms will be considered more profoundly. Sandholtz (2008: 108-109) briefly examines the role of power and correctly maintains that rule-breaking does not equate to rule-making. Even in the case of powerful states, the justification given for norm transgression as well as the reaction of other states are crucial to determine the continued relevance of the norm. He concludes that even powerful states need to persuade other states in order to arrive at a change of the existing norms (Sandholtz, 2008: 109). Nevertheless, in the argumentative stage, power does facilitate the communication. Powerful states are more widely present on a diplomatic level and better represented in international institutions; and they have more direct access to mass media (Sandholtz and Stiles, 2009: 13-15). In the final stage of the cycle-theory, the actual rule change takes place and the cycle has completed (Sandholtz, 2008: 110). The arguments and justifications offered by different sides now lead to normative change, which can happen in

many ways. The content of a rule might be altered, or the modification might also be limited to the strength, clarity or specificity of a rule (Sandholtz, 2008: 110).

A final model is that of Florini (1996), who presents an innovative evolutionary model of international norms. Rooted in the constructivist tradition, she applies insights from evolutionary biology to the area of international relations theory by drawing analogies between genes and norms. She argues that the existing norms and ideas, at any given moment in time, are not merely produced by materially powerful actors to serve their own interests (Florini, 1996: 367). Her evolutionary model thus downplays the role of power as the driver of norm change. To do so, the author draws a three-level analogy between norms and genes. On the first level, she argues that norms and genes perform similar functions as “the instructional units directing the behavior of their respective organisms” (Florini, 1996: 367). On the second level, she asserts that a similar process of inheritance accounts for the transmittance of norms and genes from one individual to another. Thirdly, both norms and genes are contested, meaning norms have to compete with rivalling norms carrying incompatible instructions (Florini, 1996: 367). Florini ‘s (1996: 369) analogy with natural selection means that change in the characteristics of states results from “competition among norms that are reproduced at different rates and that thus come to have different frequencies in the population of states”. Due to the variation in competing norms, different levels of reproductive advantage, and different likelihoods of being transmitted; some norms may become more prominent than others at a given moment in time, for instance because they are more compatible with surrounding norms and environmental conditions (Florini, 1996: 369). Noteworthy, in this respect, is that natural selection is cumulative but not teleological. Respectively this signifies that an addition of small changes can lead to substantial change over time and that this evolution has no final goal (Florini, 1996: 369).

In the evolutionary model of norm change, the role of material power of the ‘host organism’ is pushed to the background. It is only the norm’s evolutionary advantage for itself that explains the evolution of that norm, viz. there is no need to account for the evolutionary advantage of the norm to its host organism

(Florini, 1996: 373). Rather, the factors determining the reproductive success or failure of contested norms are “(1) whether a norm becomes prominent enough in the norm pool to gain a foothold; (2) how well it interacts with other prevailing norms with which it is not in competition, that is, the ‘normative environment’; and (3) what external environmental conditions confront the norm pool” (Florini, 1996: 374). To explain the evolution of a norm, each of these factors must occur.

Florini (1996: 377) correctly asserts that the occurrence of the above mentioned factors explains which norms will spread, but not how those norms will spread. In fact, this question leads us to consider the role of thinking. For a fundamental assumption in Florini’s (1996: 378) evolutionary argument is that rational choice theory is not the best model to explain the spread of a norm. This is why

[H]uman “choices” about behavior are based far more on simple imitation, encoded in the form of a norm, than on deliberate weighing of well-considered and well-understood options. [...] Even norms that originate and begin to spread through rational processes are subject to selection pressures that are inherently nonrational.

Florini (1996: 378) adds that norm reproduction can take the vertical form of a continuation of norms or the horizontal form of emulation or norm change.

To understand the evolution of a specific norm, the above-mentioned factors of prominence, coherence and normative environment must be traced domestically and internationally (Florini, 1996: 379). A new norm thus emerges domestically, but, for Florini (1996: 379) this domestic origin is disconnected from the later evolution of that norm. While Florini (1996: 379) is right in asserting that the origin of a mutant norm or new idea is not crucial to the evolutionary story, and while the reproductive mechanism she proposes has been confirmed in more recent research; it is nevertheless true that the evolutionary model is not completely convincing in explaining which norms arise in the first place. By focusing on the non-teleological nature of normative evolution, Florini loses sight of the power structures and the organisational

platforms norm entrepreneurs use to 'back' new norms.

Eminently, these issues are also inadequately considered in the other models presented in this section. In reaction to this, and in preparation for the empirical analysis later on, the following section will present a modified model of norm change that incorporates a notion of power that captures the dynamics of norm change more accurately. This model can serve as a heuristic tool to direct the attention of the empirical analysis.

### 3.4 The Return of Power

The model of norm change used in this study will not divert fundamentally from Sandholtz's proposal. However, it will add two elements. First, it will incorporate a realist constructivist notion of power. According to Adler (1997: 336), power exceeds the availability of resources used for spreading one's ideas:

[It is] the authority to determine the shared meanings that constitute the identities, interests and practices of states, as well as the conditions that confer, defer or deny access to 'goods' and benefits. Because social reality is a matter of imposing meanings and functions on physical objects that do not already have those meanings and functions, the ability to create the underlying rules of the game, to define what constitutes acceptable play, and to be able to get other actors to commit themselves to those rules because they are now part of their self-understandings is perhaps the most subtle and most effective form of power.

I concur with Adler that this authority is the ultimate form of power.<sup>23</sup> It is worth mentioning that, although Adler and Bernstein's (2005: 298) definition of power is very similar to Adler's (1997: 336) the former's stresses the role of knowledge. Power, for Adler and Bernstein (2005: 298) is the "the authority to

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<sup>23</sup> It corresponds to what Barnett and Duvall (2005: 3) have termed "productive power" or the "production of subjectivity in systems of meaning and signification". If patterns of action are internalised as 'appropriate behaviour', this attributes great power to whoever can shape these shared meanings.

validate the knowledge on which an episteme is based (and is therefore akin to both institutional power and compulsory power) and the authority, of which epistemes are productive, to construct subjectivity and social facts". Knowledge, it is important to note, is not value-neutral since in the creation of a particular social order, some are included and others are excluded (Adler, 1997: 336). The question then becomes: where does this authority arise from? Which knowledge is authoritative and which is not? Who possesses the authority to construct reality?

My reply to these questions is that there are different dimensions to realist constructivist power. Power is not one-dimensional but takes on different forms that open up different opportunities to create the social world. With regard to this research project, it is not because an economic or military powerful international actor uses PMSCs, that this has become acceptable. Rather, the use of PMSCs becomes acceptable if discursively agreed upon. From this point of view, it is the ability to influence the "negotiated consensus" (Steffek, 2003: 267) that determines an actor's normative power. The empirical analysis of this research project will contribute to a deeper understanding of this discursive and normative power through an analysis of three instances of legitimation. Legitimacy, as understood in this text, is an intersubjectively shared "normative belief" (Hurd, 1999: 381) of the worthiness of an order or rule to be recognised or obeyed (cf. Habermas, 1979). Habermas (1984) stresses the contestability of each particular validity claim. In this respect, legitimation refers to the dynamics of legitimacy or to the "acts and processes that (aim to) establish the general view that a political order is (not) acceptable" (Gaus, 2011: 3). Steffek (2003: 267) thinks of legitimacy as the result of a two-step process, in which negotiators first arrive at a consensus on the "scope, principles and procedures of the regime" and subsequently try to justify the regime with the aim of achieving "rational assent". Taking discursive power in the military domain as an example, this text will build upon the epistemic communities model to show that epistemic power and more specifically 'being recognised as' an epistemic community is crucial in generating the authority to (re)shape a normative structure.

Negotiations do not happen in an "ideal-speech situation" (where truth amounts



to the rationally agreed upon consensus reached after an exchange of arguments) in which speakers do not experience any constraint on their participation (Habermas, 1970, Owen, 2002: 49). What is more, Mouffe (1999: 751) argues that an ideal-speech situation is ontologically impossible. Speech situations are inevitably distorted by power. First, because only the voices of those negotiators will be heard, that have the resources to contribute. Second, and more fundamentally, because the condition of a secure environment is a prerequisite to create a speech situation. Foreshadowing the arguments in later chapters, the ability to set the terms of the (norm) negotiation is one dimension of power. This is facilitated by the material resources available to an actor, underlying his ability to participate in the discursive negotiation. If a participant is not able to attend meetings, to issue briefings, to lobby, and so on, his influence will most likely be limited. Furthermore, this ability to participate in the debate depends on the distance to the centre of the debate, i.e. on the number of 'filters' or 'gates' a discursive contribution has to pass. Proximity to the centre of the debate facilitates influence. The ability to create the conditions for a discursive exchange is at the core of this negotiation power. Importantly, a secure environment is a precondition for norm negotiations, because outside a secure environment, no sincere exchange of arguments can take place - a secure environment therefore precedes peaceful speech. As we will see, PMSCs cultivate their ability to create a secure environment in which a debate can take place. They possess the resources to enhance the security of their clients and this security, the empirical research clarifies, is still a major concern for state and non-state clients alike. Most NGOs, on the other hand, lack this capacity. The alternative proposed by NGOs is less likely to generate security and, therefore, less usable.

Another dimension of realist constructivist power is the epistemic power to offer a valid model of what the world looks like. Communities that can make credible claims to knowledge production have an advantage in any negotiation. This advantage is enhanced if this knowledge is also perceived as 'usable' by central policymakers. The ability to offer 'usable knowledge', conducive to the furtherance of the participants' interests, brings with it an opportunity to steer the negotiation. "Usable knowledge", Haas (2004: 574-575) argues, is "accurate information that is of use to politicians and policymakers" in their effort to

achieve collective goals. If policymakers have to choose between usable and less usable knowledge, they are likely to opt for the first. Usable knowledge is credible, legitimate and salient (Haas, 2004: 574). Later chapters will show that PMSCs, as an epistemic community, were able to offer credible, practically legitimate and politically salient knowledge and solutions to policy challenges.

More subtle dimensions of power include persuasion. Payne (2001), for instance, makes explicit some mechanisms through which norm construction takes place. This author contends that persuasion is a central mechanism in the construction of new norms. To explain this persuasion by successful norm entrepreneurs, authors working in the constructivist tradition often invoke the mechanism of framing as a central element (Payne, 2001: 39-40). New normative claims gain a foothold when they are framed in such a way that they appeal to a relevant public by coinciding with established ideas, practices and normative structures (Payne, 2001: 39, 43). This happens when a norm entrepreneur can offer relevant knowledge or when norms are framed in a 'promising' way. However, Payne (2001) contends that there are serious problems with this reliance on framing to explain normative change. Payne's central claim borrows from Habermasian critical theory and maintains that constructivist accounts of norm change focusing on persuasive frames are overlooking social process:

Regardless of the alleged appeal of specific claims, outcomes of 'highly contested' normative struggles cannot adequately be interpreted without also examining social process. The communicative environment, in fact, almost certainly matters more than the content or framing of specific messages (Payne, 2001: 39).

This observation is confirmed by the research of Lee and Strang (2006) discussed below. For now, Payne (2001) points out two main weaknesses of attributing too much importance to the role of framing. On the one hand, he mentions the potential distortion of frames by coercion by materially powerful actors, who have at their disposal resources to influence and shape the communicative situation (Payne, 2001: 45). On the other hand, Payne (2001:

43) contends that the final outcome of a norm change is not always the same as intended by its advocate, due to social process and the relational qualities of discursive exchanges. They force both norm advocates and their targets to “be prepared to have their understanding of a situation challenged”, since the eventual mutual meanings always need to be intersubjectively shared. The former claim corresponds to what I have referred to earlier as the impossibility of an ideal-speech situation. For example, in discussions on the future regulatory framework of the private military and security industry, PMSCs were able to offer ‘usable knowledge’ to state decision-makers, while the contributions by civil society were deemed less usable.

The second element to be inserted in the cycle-theory of norm change is drawn from the network emulation research by Lee and Strang (2006). These authors have analysed the evolution of the size of the public sector between 1980 and 1997 in twenty-six OECD member states. The results of this research can inform the present study in two ways. First of all, the period in which these authors observe the downsizing of the public sector coincides with the period in which PMSCs made their appearance on the international scene. Secondly, the empirical findings of their research anchor the proposed model of norm change in a more empirically informed background. After three decades of growth in government size after the Second World War, the 1980s and 1990s showed a tendency to downsize the public sector in the majority of the OECD member states. Leading the way in privatising and outsourcing traditional public sector responsibilities were US president Reagan and UK prime minister Thatcher (Lee and Strang, 2006: 883). While this tendency was by no means universal, “a net shrinking of the state was an explicit goal of many in the 1980s and 1990s” (Lee and Strang, 2006: 885). The focus of Lee and Strang in all this is on the international diffusion of the downsizing strategy. The authors wonder whether this downsizing policy is contagious, viz. whether downsizing in one country affects the policy of other countries. According to the economic orthodoxy of the 1980s and 1990s, economic growth was hampered by an oversized public sector and this idea was mirrored in political as well as academic discourse. Leading organisational theories promoted decentralisation and downsizing for both public and private enterprises. Lee and Strang (2006: 886) argue that these discourses are closely related to international policy

diffusion. They (Lee and Strang, 2006: 904) further note how emulation, competition and vicarious learning lead governments to adopt new policies that cannot fully be explained by rational choice models. Emulation manifests itself in the form of peer-based emulation or of asymmetric emulation of community leaders, both centred around “the social construction of appropriate behavior, where actors model their behavior on the examples provided by others” (Lee and Strang, 2006: 889). Rivalry between competitors can lead to copying the behaviour of rivals of, when it is expected to attract economic success. Vicarious learning means that countries consider other countries as examples which must or must not be copied, depending on the outcomes of the ‘policy-experiment’ in that country (Lee and Strang, 2006: 890). Legitimate practices diffuse more easily than illegitimate ones because the latter will probably be covered up, while normatively approved behaviour is more likely to be aired more widely. Lee and Strang (2006: 890-891) add that “practices spread more rapidly and less relationally when they are theorized in terms of general models of behavior and cause-effect schemes”. All of these factors were present in the discourse on public-sector downsizing which was propagated by politicians and academics alike. Emulation, competition and learning presupposes a model to learn from. New policies do not appear out of thin air, but require the agency of key political actors, primarily on the domestic level (Lee and Strang, 2006: 888). Specifically for public-sector downsizing, internal factors play a role in the diffusion mechanism: fiscal stress, economic performance, the strength of key interest groups within a country and some cultural underpinnings (Lee and Strang, 2006: 892). Kogut and McPherson (2008) furthermore stress the role of epistemic communities in the diffusion process and more specifically of American (Chicago-School) trained economists.

Lee and Strang (2006: 900) conclude that “downsizing appears to be contagious, while upsizing does not”. As mentioned above, the regression analyses used in their research project indicate how international policy diffusion is indispensable in explaining the evolution of the public sector size, in addition to elements such as domestic economic and political factors. This influence is weaker or stronger depending on the relationship between countries. In this respect, Lee and Strang (2006: 903) suggest that information flows and cultural links influence the emulation process, observing that

neighbouring countries and extensive trading partners influence each other more readily, while this is less the case for trade rivals. Moreover, this influence seems to be heading in the direction of downsizing, since downsizing is promoted by proximity to downsizers and by evidence of the economic benefits of downsizing; whereas no upsizing effects are observed for proximity to upsizers or for evidence of the economic benefit of upsizing (Lee and Strang 2006: 903). The authors explain this difference by referring to the status of upsizing and downsizing and the dominance of neoliberalism in policy discourse and academic theory. Whereas downsizing was propagated as the way to success, upsizing was considered a step back (Lee and Strang 2006: 903). Thus the rational choice models to explain the diffusion of policies are challenged by theory-driven learning: “if only evidence that confirms beliefs is believed, learning is neither rational nor adaptive!” (Lee and Strang 2006: 904).

The style of reasoning and the models of norm change discussed above - in particular the model provided by Sandholtz - will inform the following study of norm change in the privatisation of military activities. These theories will be supplemented with modifications from the different perspectives (also discussed above). Although norm change eludes precise measurement, I will mainly use two measures to determine whether a norm change has taken place.<sup>24</sup> First, I will consider international law as a reflection of existing norms (cf. Thomas, 2001). This means that changes in the legal stipulations may be an indicator of norm change (Krahmann 2013: 57). Second, I will analyse how participants in the debate on a new regulatory environment discursively use norms “to legitimize particular actions or behavior” (Krahmann, (2013: 57). A combination of the above model of norm change and a general theory of change in military practice, as reviewed in the second chapter, will provide us with the theoretical tools needed to comprehend the contemporary rise and regulation of PMSCs.

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<sup>24</sup> These two measures figure among four measures identified by Krahmann (2013: 57).

#### **4. PMSC Power in the New Security Environment**

This chapter situates PMSCs in the contemporary security environment and identifies the nature and sources of their power. To start understanding the contemporary security environment, it is important to see how the neoliberal critique in the late 1970s stimulated a search for a new model of the state. Later, the 1991 collapse of the Soviet Union also caused uncertainty in the practice of international relations and in international relations theory. Eminently, this sense of confusion corresponds to the first stage in a cycle of norm change. The implosion of the Soviet Union was an exogenous shock - in the terms of Avant (2000) - that delegitimised not only the academic theories on the nature of the international system, but also the practical wisdom on how to cope with the challenges of the fluid security landscape. The familiar lens of state-centred conceptualisations of security fell to pieces. In its place came a feverish quest for the identification of new risks and threats and a scramble for appropriate responses. This shock, according with Avant's model, obscured and diffused power relations and undermined existing knowledge and worldviews. Initially, new security actors, such as PMSCs contributed to this uncertainty. As protean, shape-shifting actors they defied existing conceptualisation and categorisation (Carmola, 2010). Over time, however, PMSCs formed a community of practice and achieved the status of security professionals. Later, they were even recognised, although implicitly, as an epistemic community offering 'usable knowledge' to their clients. This usable knowledge forms the key to their influence on norm construction. The recognition as an epistemic community allowed PMSCs to 'speak security' and to contribute to policymaking instead of merely implementing it. Both the uncertainty after the end of the Cold War and the epistemic power of PMSCs were prerequisites for successfully challenging the norm of the state monopoly on violence. This chapter does the groundwork for the following chapter, that will trace the contribution of individual entrepreneurs to the legitimisation of PMSCs. Following Basu and Pallazo (2008: 126), it upholds that it is under "conditions of extreme uncertainty, brought about by fundamental social changes, [that] organizations might strive to achieve legitimacy by cocreating acceptable norms of behavior with relevant stakeholders". The last quarter of the twentieth century knew such conditions.

In the following, the first section sketches the confusion in international relations and in the domains of international relations theory and security studies, after the Cold War. The second section illustrates this confusion by reviewing the discussion on the classification of PMSCs in international law while section 4.3 argues that PMSCs have successfully reframed themselves from mercenaries into security professionals. The fourth section will then show how PMSCs, as new actors after the end of the Cold War, came close to constituting an epistemic community. This status gave them legitimacy and allowed them to act as norm entrepreneurs.

#### 4.1 Confusion after the Cold War

The last quarter of the twentieth century saw a double delegitimation of the dominant conception of the state. In both instances, this delegitimation was made possible by the discontent generated by the seeming incapacity of the state to provide for human well-being. The disagreement, uncertainty and confusion (about which political organisation was most suitable for achieving well-being) created the opportunity for political entrepreneurs to propose an alternative model.

The economic crisis of the 1970s mystified conventional mechanisms of welfare creation. Therefore, the first of two delegitimation processes involved, concerns a neoliberal inspired set of ideas (Kjær and Pedersen, 2001: 221) that undermined the legitimacy of the Keynesian welfare state. More specifically, the Yom Kippur War (1973), resulting in the OPEC oil cap, produced a global economic recession that dealt the death blow to Keynesian economics (Hay, 2001: 207). By the second half of the 1970s, Keynesian inspired policy (as practiced by the UK Labour Party) was unable to counter the rising inflation and unemployment because of the incompatibility of its “overarching (indeed paradigmatic) policy commitment to full employment, mixed economy and a comprehensive welfare state” with its monetary policy (Hay, 2001: 208-209). The Keynesian welfare state’s inability to adequately respond to the long-lasting stagflation opened up a venue for neoliberal inspired policies to successfully promote market solutions to sectors previously under government control. The economic component of neoliberalism favoured marketisation over the undue

government constraints on economic behaviour (Simmons, Dobbin and Garrett, 2008: 2). The undercurrent connecting the diverse neoliberal practices maintains the following:

[H]uman well-being can best be advanced by liberating individual entrepreneurial freedoms and skills within an institutional framework characterized by strong property rights, free markets and free trade. The role of the state is to create and preserve an institutional framework appropriate to such practices (Harvey, 2007:2).

Of course, the state was not dissolved altogether. On the contrary, the optimal functioning of the market requires a strong state to guarantee individual liberty and respect for the rule of law (Thatcher, 1979). Therefore, the state should always possess sufficient resources or techniques to guarantee individual freedom and property rights. In this way, the first process of delegitimation opened up space for the “regulatory state” to take the place of the “dirigiste state” (Majone, 1994).

A second process of delegitimation centred on the state’s perceived inability to protect its citizens, at least on the international scene after the Cold War. The state’s ‘output legitimacy’ in the domain of security provision - that hinged upon its ability to secure a safe environment for its citizens - was not only compromised in weak third world states (cf. McIntyre and Weiss, 2009); but also in former superpowers, where 9/11 added a sense of urgency to the search for a “new balance between security concerns, which have taken primacy, and governance/values concerns, which risk being compromised” (Hänggi, 2003: 4). This confusion transcended the practical policy domain and penetrated the academic field. After the abrupt and unforeseen end of the Cold War, practitioners in the political domain were in a state of “Babel-like confusion” on the nature of the international relations system (Roberts, 2008: 343). Likewise, this complete surprise shook the domain of international relations theory to its core and has been the impetus to profound academic “soul-searching” resulting in new approaches to the field (Sørensen, 1998: 83, Roberts, 2008: 339). The confusion and uncertainty also extended into the field of security studies. It might even be claimed that traditional security studies lost their “raison d’être”, since the Cold War was “the progenitor of the field and its central focus from



1955 on” (Baldwin, 1995: 132). New threats (Krahmann, 2005b), the transformation from “old” to “new” wars (Kaldor, 2001), and the emergence of new actors were symptomatic of the changing international environment and of the reconceptualization of security. The appropriate role of the state in these new wars and, more generally, in the provision of security, became the object of debate. Thus, the state’s monopoly on violence came to be called into question.

Bypassing the ‘new wars’ discussion on whether or not the nature or character of contemporary warfare is qualitatively distinct from conflict in previous eras; it is safe to conclude that in post-Cold War armed conflict, non-state actors were perceived to (re-)emerge on a scale unprecedented in the previous three quarters of the twentieth century. In contrast to the bipolar world where security was mainly understood in terms of existential (nuclear) threats to national security and sovereignty; the post-Cold War era has seen a pluralisation of security (Caparini, 2006) or a widening and deepening of the Cold War concept of security (Hänggi, 2003). States are no longer the sole referent object of security. Instead, the deepening of the Cold War concept of security means that “individuals and collectivities other than the state” have manifested themselves as referent objects (Hänggi, 2003: 5). Its widening implies that military threats have been subsumed by economic, social and environmental threats (Hänggi, 2003: 5). In addition to this widening and deepening, the internationalisation of security can be considered a third axis along which the traditional notion of security has been reconfigured (Krause, 1998: 127-129). After 1990, various international, regional and multilateral organisations have authorised the use of force (Hänggi, 2004: 3, Ku and Jacobson, 2002: 17). In such a context, the decision-making authority of states is not always clear. In line with this, a reconfiguration of the classic components of civil-military relations is called for. Flexibility, adaptability and rapid deployment of armed forces are keywords in a modern security and defense policy (Heidenkamp, 2012: 1). On the one hand, “postmodern” armed forces draw upon more than just the military, and include intelligence services, special police forces and border control forces (Moskos, Williams and Segal, 2000, Forster, 2002: 77-79). Increasingly, they also include PMSCs to carry out a variety of new missions. On the other hand, national governments have given way to regional, international and multilateral organisations, but also to non-state actors as auspices of the use of force. So, non-state actors have taken their place on the demand side as well as on the

supply side of security provision.

Notably, these observations indicate that Cold War categorisations of security actors have become outdated. Illustrative in this regard is the conceptualisation of PMSCs that seem to defy both academic and legal categorisation. Carmola's (2010: 9) characterisation of PMSCs as "protean shape-shifters" should be interpreted in this light. PMSCs appeared to be hybrid entities or quasi-organisations, which is public policy analysis jargon for organisations that display characteristics of both the public and the private sector (Carmola, 2010: 10-11). Carmola (2010: 27) argues that PMSCs are protean because they "combine organizational cultures that in many cases have defined themselves in opposition to one another".<sup>25</sup> They simultaneously display the significantly different and even opposing aims, ethics and cultures of government bureaucracies (among others the military), corporate business players and humanitarian, non-governmental organisations (Carmola, 2010: 27). What is more, PMSCs deliberately and simultaneously cultivate the images of all these categories (cf. Kruck and Spencer, 2013: 332). Moreover, the conceptual confusion resulting from their protean character and their combination of different organisational cultures also feeds back into discussions on the status of PMSC employees in international law (Carmola, 2010: 37). PMSCs thus challenge the mental models that have framed the formulation of current international law. Their alternating identity obstructs a clear judgment on the acceptability and even comprehensibility of PMSC actions (Carmola, 2010: 38). As Carmola (2010: 38) indicates: "For a while, we push ambiguous entities into some non-ambiguous category (mercenary or soldier, for instance), but eventually the cognitive dissonance builds and we are forced to invent new social categories, and ultimately new legal identities". The discussion on the legal qualification of PMSCs in international law is illustrative in this regard.

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<sup>25</sup> Carmola (2010: 29) understands organisational culture as "historical and cultural attitudes and 'ways of life' of an organization that guide action and judgment".

## 4.2 PMSCs in International Law

Initially, the image was widespread that PMSCs were operating in a legal vacuum. (cf. Singer, 2004, Walker and Whyte, 2005). Even if this evaluation has been largely refuted by later research, the debate on their proper place in international law continues. The legal framework regulating these companies is composed of international humanitarian law, human rights law and mercenary conventions; complemented with the more encompassing regulations on business and human rights and corporate social responsibility (MacLeod, 2011). More recent initiatives - such as the Montreux document, promoting good practices in dealing with PMSCs, and voluntary codes of conduct - have been promoted by PMSCs themselves to counter the negative industry image. We will return to the latter two mechanisms later, since they constitute a new way of governing the security sector.

Despite the absence of a regulatory deficit, this legal framework is undeniably “disjointed and, in some respects at least, contradictory” (Fallah, 2006: 601). Due to its relative novelty, the term ‘private military and security company’ is not a term of law. In other words, it is not defined in legal conventions or legal instruments (Fallah, 2006: 602). Thus, PMSCs do not have a status nor obligations under international humanitarian law, diverting the focus of attention to their employees who, as individuals, do have such a status. This status has to be determined on a case by case basis, depending on the relationship of the employees with the state they are contracted by and on the operations they perform (Gillard, 2006: 530). By the nature of their activities, PMSC employees have frequently been termed mercenaries. The offering of military services for financial gain, often in situations of armed conflict, is indeed a common denominator of both mercenaries and PMSCs. Nevertheless, academic, political and judicial opinions on the classification of PMSCs diverge. Classifying PMSCs does not remain an informal terminological exercise, but has implications for the status of PMSC employees in international law - not in the least because mercenarism has been made a criminal offense.

#### 4.2.1 PMSCs as Mercenaries

The term 'mercenary' is an essentially contested concept. Attempting to formulate a universal definition falls outside the scope of this text. It can even be argued that such a final definition is pointless, since what is and what is not a mercenary has varied throughout history. A commonly accepted definition sees a mercenary as a professional, foreign soldier offering military services on a freelance, contractual basis for a financial reward (Musah and Fayemi, 2000: 5). It has been a particularly delicate task to differentiate mercenaries from related foreign fighters who are nevertheless not intuitively labelled mercenaries. Examples of these foreign servicemen include the French Foreign Legion, the Swiss Guard, Gurkhas in the British and Indian armies, and the International Brigade in the Spanish civil war (Mockler, 1970: 17). Despite being enlisted and financially rewarded by a foreign government, these fighters are generally not considered mercenaries. In other words, the mere fact that a soldier is a financially rewarded foreigner does not make him a mercenary. An additional criterion is needed. Mockler (1970: 17, 21) has found this in the moral aspect constituting a legitimate fighter: it is this moral judgment - the morally disapproved of "devotion to war for its own sake" - that marks the difference between a mercenary and a legitimate, uniformed soldier. However, this moral disapproval is equally dependent on the cultural environment actors are embedded in. For instance, in Christian times and places, a "devotion to duty" has indeed come to replace the love of war; while in ancient Greece, Scandinavia or feudal Japan devotion to war was admired (Mockler, 1969: 21). Mockler (1969: 14) recognises these definitional obstacles and therefore defines a mercenary as a soldier who is neither "a tribesman fighting for his tribe nor a conscript fighting for his country". In other words, this fighter lacks the durable bond with his employer, that can provide him with a nonfinancial motivation. In this respect – and in line with previous observations - Mockler sees the normative implications of the French Revolution as a turning point. After the revolution a twofold belief gained momentum that citizens should fight for their own country, and that fighting for another country in return for financial gain was dishonourable (Mockler, 1969: 15). However, as repeated by later authors, a man could only fight for his country when he "had a country that was more than a geographical expression to fight for" (Mockler, 1969: 15). The

transformation from a ruler-subject to a state-citizen relationship, and the concomitant emergence of notions of nationalism, patriotism and civic duty predated the shift from mercenaries to citizen armies. Through the concept of civic duty, the nation provided the commonsensical justification of military service. Even if commonsensical, Steinhoff (2008: 20-23) has correctly argued that the nation is not the only community that can legitimately inspire a person to take part in a military campaign. Therefore, Steinhoff (2008: 28) defines a mercenary as someone who, on a contractual basis, provides military services “to groups other than his own (in terms of nation, ethnic group, class, etc.) and is ready to deliver this service even if this involves taking part in hostilities. Which groups are relevant depends on the nature of the conflict”.<sup>26</sup> In other words, a mercenary is foreign to the group to which he offers his services. His motivation derives not from pertaining to the group, but from a financial reward.

More generally, from her constructivist point of view, Percy (2007a) presents us with two more critical elements separating mercenaries from regular soldiers and other foreign servicemen. Taken together, both elements constitute the norm against mercenaries. Mercenaries, quite simply, cannot be defined without reference to the cause of their motivation: they engage in armed combat because of financial gain and arrive at this decision independently, irrespective of the cause for which the violence is instigated (Percy, 2007a: 54-56). The lack of a plausible justification for killing, apart from financial gain, is what makes a mercenary morally problematic. Even though the interpretation of a just cause for the decision to resort to violence has evolved over time, it has invariably included ideological or political goals (Percy, 2007a: 54). The second element concerns the degree of legitimate control on fighters. Percy (2007a: 57) distinguishes mercenaries from regular personnel based on the degree of legitimate control by an entity “understood to have the legitimate right to wage war” - this entity being the sovereign state, inter- or supranational organisations, or, more historically, the legitimate authority at the time, (e.g. the prince, the king or the pope). Mercenaries in foreign armies are not subject to two types of control that apply to soldiers who are more or less permanently assigned to a foreign army. The first is the control of the home state, which can impose

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<sup>26</sup> So, a mercenary can also be contracted by a group of the same nationality as his, but to which he himself does not belong (Steinhoff, 2008: 21).

sanctions in case of misbehaviour. The second is the immediate control of the hiring state for units permanently attached to foreign armies (Percy 2007a: 58). For Percy (2007a: 58) this accountability deficit “is the tacit standard that underlies the international antipathy for mercenary activity and truly determines mercenary status”. These normative considerations leave us with the following definition of a mercenary. A mercenary is someone foreign to the cause of the conflict, who is prepared to take part in hostilities. He has enlisted temporarily, based on a financial motivation, and is not fully under the control of a legitimate authority. In this definition, it is understood that someone foreign to the cause of a conflict cannot justify his taking part in hostilities. So the normative element of a justifiable cause provided by a legitimate authority proves indispensable in translating the intuitive concept ‘mercenary’ into a more universally applicable definition.

However, translating a normative definition into a legally binding and enforceable document did not prove to be without difficulties. In the end, it resulted in two almost inapplicable international conventions against mercenaries. The Organization of African Unity (OAU) Convention for the Elimination of Mercenarism in Africa, dating from 1977, tried to eliminate mercenarism in the context of decolonisation in Africa (Schreier and Caparini, 2005: 147). Equally dating from 1977, Article 47 of the 1977 Protocol I Additional to the Geneva Conventions of 1949 defines the legal status of mercenaries in international law as well as their position in international humanitarian law (Schreier and Caparini, 2005: 148). The more recent UN International Convention against the Recruitment, Use, Financing, and Training of Mercenaries dates from 1989, but only entered into force in 2001. This Convention criminalises mercenaries, as well as recruiting, using, training and financing mercenaries; since these activities violate “sovereign equality, political independence, territorial integrity of States and self-determination of peoples” (UN, 1989: 1). To do so, it provides a recent and widespread definition of the term mercenary, which runs as follows:

[A]ny person who (a) Is specially recruited locally or abroad in order to fight in an armed conflict; (b) Is motivated to take part in the hostilities essentially by the

desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar rank and functions in the armed forces of that party; (c) Is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict; (d) Is not a member of the armed forces of a party to the conflict; and (e) Has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces.

Mercenarism does not stay limited to armed conflict, since a mercenary can also be anyone who:

(a) Is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at: (i) Overthrowing a Government or otherwise undermining the constitutional order of a State; or (ii) Undermining the territorial integrity of a State; (b) Is motivated to take part therein essentially by the desire for significant private gain and is prompted by the promise or payment of material compensation; (c) Is neither a national nor a resident of the State against which such an act is directed; (d) Has not been sent by a State on official duty; and (e) Is not a member of the armed forces of the State on whose territory the act is undertaken.

A strict reading of the above definition would include certain categories of foreign soldiers, as described above, which traditionally escape the mercenary label. This ambiguity is due to the difficulty of translating the normative aspects of the definition into a binding international treaty. Nevertheless, this convention is the most recent and most widespread treaty against mercenarism, as it is currently ratified by thirty three countries. We will not delve deeper in the discussion of the difficulties of drawing up such a convention, but we will focus

on the classification of PMSC employees under the mentioned conventions.

Cameron (2006: 578) correctly asserts that neither the mercenary conventions, nor international humanitarian law allow for general conclusions on the classification of PMSC employees as mercenaries. Rather, these bodies of law urge us to determine the status of individual PMSC employees on a case-by-case basis. After such an analysis some (admittedly very few) employees do qualify as mercenaries while others do not. Furthermore, the requirement of the cumulative satisfaction of the above-mentioned criteria render the conventions inadequate to regulate the PMSC industry (Cameron, 2006: 578), since a case-by-case determination does not promote transparency in international law.

Conditions 1 (a) and 1 (b) of the UN Convention continue to generate debate among commentators of international law as they try to clarify the implications of snippets like “to fight in an armed conflict” and “taking direct part in hostilities”. The thin line between ‘taking direct part in hostilities’ and ‘assisting the armed forces’ has not yet fully been clarified. While some emerging PMCs in the 1990s definitely performed combat activities (Faite, 2008: 1), PMSCs currently put forward that such practices are in the past. Still, it is not fully clear whether, for instance, protecting a convoy or an army base qualifies as taking part in hostilities.<sup>27</sup> Regarding condition 1 (a), it has further been argued that it implies that employees permanently employed by a PMSC do not qualify as mercenaries, while employees temporarily employed for a specific operation do (Faite, 2008: 4), if they satisfy the remaining conditions. While arguably uncommon, PMSC personnel formally incorporated in the armed forces of a party do not fall under the mercenary label (Faite, 2008: 4). It is predominantly condition 1 (c), however, that prevents labelling PMSCs as mercenaries in international law, because PMSC employees are regularly nationals of a party to the conflict. This can lead to confusing situations in which “a German working for a US PMSC during the international conflict in Iraq would fall within Article 47 [of the 1977 Protocol I], whereas his American and British co-workers would not” (Doswald-Beck, 2007: 123).

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<sup>27</sup> On this issue, the ICRC (2008) has recently issued the “Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law”.



Paramount in the discussions on conditions 1(d) and (e) is the question whether PMSCs are part of the armed forces of a party to the conflict. Since international humanitarian law does not prescribe a uniform method to determine whether people are included in the armed forces, this process is left to domestic law (Cameron, 2006: 583). Nevertheless, it is safe to conclude that PMSC employees are included in the armed forces only in rare cases (Cameron, 2006: 583). PMSCs might perform official duties for a party to the conflict (cf. 1 (e)), but it is less clear whether this implies that they become part of the armed forces.

From the point of view of international humanitarian law, the dividing line between mercenaries and PMSC employees is therefore hard to draw and boils down to a case-by-case analysis. Nevertheless, PMSC employees have consistently not been considered mercenaries in armed conflicts.

#### 4.2.2 PMSCs as Combatants or Civilians

If they are not mercenaries, then what status is attributed to PMSC employees in armed conflict? Two options remain. They can either be combatants or civilians. The precise determination of this status has far-reaching consequences. On the one hand, combatants have the right to take direct part in hostilities and cannot be prosecuted for this/ As a result, however, they can be targeted at all times (Gillard, 2006: 531). If captured, furthermore, combatants are entitled to prisoner-of-war status (Gillard, 2006: 531). Civilians, on the other hand, may not be attacked and cannot take direct part in hostilities. If they do so, they lose their immunity from attack and will be considered “unprivileged belligerents” or “unlawful combatants”, implying that they can not claim prisoner-of-war status and that they can even be prosecuted for their participation (Gillard, 2006: 531).

Applied to PMSC personnel, the status as combatants or civilians determines whether these employees may directly participate in hostilities, whether they can be prosecuted for this, and whether they can be considered legitimate targets (Cameron, 2006: 582). Participants in an armed conflict gain combatant status when they are members of the armed forces of a party to the conflict, or

when they are members of a militia group or volunteer corps belonging to a party to the conflict and fulfilling certain conditions (Cameron, 2006: 582-584).<sup>28</sup> Cameron (2006: 583) contends that only in rare cases PMSCs are incorporated in the armed forces, because the aim of privatisation (viz., “to devolve on the private sector what was previously the preserve of government authorities”), runs counter to the logic of incorporation. It is also contended by governments that they consider PMSC employees as civilian contractors and not as combatants (Cameron, 2006: 573). However, sometimes PMSCs themselves point out that they are part of the military forces of a party to the conflict, and that they have concluded official contracts for their actions. Thus, for example, employees of certain PMSCs try to gain combatant status as a strategy in holding off civil lawsuits for their involvement in prisoner abuse in Abu Ghraib (Cameron, 2006: 575). This observation points to severe difficulties in determining the status of PMSCs, driven in part by conflicting underlying interests of the actors in play. Most commentators also assert that civilian contractors only rarely fulfill all four requirements of the relevant article (Article 4A (2)) of the Third Geneva Convention (determining membership of armed forces). This means that most PMSC employees would not qualify as combatants, nor as members of a militia (cf. Schmitt, 2005). Cameron (2006: 586) also mentions a teleological interpretation of article 4(A)2 as a further argument against subsuming PMSCs in the combatant category: “use of the said provision to justify their categorization as combatants runs counter to its historical purpose, which was to allow for partisans in the Second World War to have prisoner-of-war status”.

We can safely conclude that few PMSC employees will be considered combatants under international humanitarian law. Logically, they should consequently be considered civilians, who do not have a right to take part in hostilities. However, notorious incidents in Iraq and Afghanistan did question the viability of this qualification. They transform the discussion into an exegesis of international law and most notably of the concept of ‘taking part in hostilities.’ In the 1987 International Committee of the Red Cross commentary to the 1977

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<sup>28</sup> Membership of the armed forces or of a militia or volunteer corps can be evaluated by means of Article 4(A) 1 of the Third Geneva Convention or by Article 43 of Protocol I (concerning armed forces) and Article 4(A) 2 of the same Convention (Cameron, 2006: 582-583, Faite, 2008: 6-7).

additional Protocol I to the Geneva Conventions, direct participation means “acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces”.<sup>29</sup> But this commentary does not end the discussions on the classification of the activities of PMSCs. Some of the PMSC activities listed in the first chapter - such as cooking, cleaning and translating - certainly do not fall under this interpretation of direct participation. On the contrary, deliveries and transportations of weapons and military material, strategic planning, intelligence and reconnaissance, might be considered direct participation (Faite, 2008: 7). Civilians taking part in these activities lose protection under international humanitarian law for as long as they are engaged in them. With regard to guarding activities, it must furthermore be taken into account whether or not PMSCs are protecting potential military objectives, and how their employees react in case of an attack. While PMSC employees are entitled to use force in self-defence or to protect civilian objects without losing their protection as civilians under international humanitarian law; the situation is different when they are guarding military objectives. Faite (2008: 8) argues that “[i]n situations of armed conflict, it is arguable that guarding infrastructures such as army bases, barracks or ammunition dumps constitutes in itself a direct participation in the hostilities”. This leads to the situation that PMSC employees constitute legitimate targets of attack when they are on duty, losing their protection as civilians under international humanitarian law, but regaining this protection when off-duty (Faite, 2008: 8). The situation again changes when PMSC employees are guarding non-military infrastructure that can be legitimately targeted in an armed conflict, such as critical infrastructure (e.g. power plants), or transportation facilities (e.g. main roads and airports).<sup>30</sup> When they are guarding these legitimate targets, PMSCs remain civilians as long as they do not return fire besides in self-defence. If they return fire in any other circumstance, their

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<sup>29</sup> The International Committee of the Red Cross 1987 commentary to article 51 of the 1977 Additional Protocol I to the Geneva Conventions. <<http://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?viewComments=LookUpCOMART&articleUNID=4BEBD9920AE0AEAE12563CD0051DC9E>>, (accessed 01/07/2014).

<sup>30</sup> Non-military infrastructures become a legitimate military target under Article 52 (2) of the Additional Protocol I when “their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage”.

status one again needs to be determined on a case-by-case basis (Faite, 2008: 9).

The obvious conclusion of this discussion on legal terminology is that the classification of PMSC employees as combatants, civilians or mercenaries ends up in a case-by-case and company-by-company analysis. This time-consuming process does not promote compliance with international humanitarian law - a situation that is even aggravated by the protean character of PMSCs, who defy the boundaries between concepts of international law. Several current initiatives aim to remedy these obstacles by means of a comprehensive regulatory framework of PMSCs. The common ground of these initiatives is that they do not try to ban PMSCs. Instead they try to legitimise a respectable PMSC industry. Remarkable in the drafting of these regulatory initiatives is that they call upon the PMSCs themselves to help shape the regulatory contours of the future PMSC industry.

The confusion in the post-Cold War security environment demonstrated that prevailing keys to international relations (theory) and security provision had become outdated. Once confronted with unconventional security providers, the institutionalised legal framework governing the exercise of armed force proved inconclusive and non-transparent. In this respect, the vagueness of the anti-mercenary norm, at least in its contemporary codification, leaves open significant room for interpretation and for a stricter formulation. The discussions above show striking similarities with what Sandholtz's model describes as the first phase of norm change. It shows the incompatibility of new phenomena with existing normative structures. In the following chapter, I will discuss the normative debate that follows this initial situation. In the remaining two sections of the present chapter, I will now first focus on why PMSCs were most successful in moulding the debate.

#### 4.3 Epistemic Communities

The foregoing debates on the applicability of international humanitarian and human rights law and related bodies of law serve to illustrate that prototypical constructs invariably need interpretation to cover real-life situations. In response

to changes in the material environment, such as technological innovations, an actor has to apply and interpret existing concepts, or devise new ones. This raises the questions who can legitimately engage in this discursive contest and who has the major impact on the resulting regulatory design. PMSCs have built up a considerable expertise in the security domain. Due to their extensive contribution to the gathering and, more importantly, the analysing of intelligence (Chesterman, 2008), PMSCs have contributed to clarifying some of the conceptual confusion after the Cold War by identifying the new threats. They were allowed to “speak security” (cf. Buzan, Waever and De Wilde, 1998). Furthermore, they have also resolved some of the functional confusion by offering solutions on how best to respond to these threats.

This section will do the groundwork for the argument that PMSCs have successfully used their expertise as a leverage to exert a decisive influence on the discourse on the outsourcing and privatisation of defence activities. Consequently, this argument continues, they were able to shape the governance initiatives on the private military industry and to co-create a modified normative framework on the state monopoly on violence, in which the private use of violence is accepted under certain conditions. To this end, I will now build upon the work of Leander (2005) and Jones (2006), who have compared the private military and security industry to an epistemic community. The epistemic community approach fits the theoretical framework outlined in the first chapter due to its link with constructivism (cf. Cross, 2013: 149, Ruggie, 1998: 69). In constructivist terminology, epistemic communities are concerned with the production of “consensual knowledge”, which, as I must stress from the outset, does not necessarily equate to “truth” (Haas, 1992: 23). Since consensual intersubjective agreement is the basis of the constructivist ontology, epistemic communities are attributed a central role in the construction of reality. They acquire a significant amount of influence on the policy process because, as Haas (1992: 23) states: “[t]he epistemological impossibility of confirming access to reality means that the group responsible for articulating the dimensions of reality has great social and political influence”. Antoniadou (2003: 21) makes this link even more explicit and attributes significant power to epistemic communities in global political interactions. As we will discuss below, it is the authoritative claim to knowledge that puts epistemic communities at the

centre of the construction of reality. For, if we dismiss the notion of truth external to human interaction, it is “each and every spacio-temporal-specific knowledge structure that defines what is knowledge” (Antoniades, 2003: 27). However, epistemic communities do not monopolise policy truth (Kogut and Macpherson, 2008: 113) and may even compete with one another. Many elements in the literature on epistemic communities reflect (the practices of) PMSCs as a professional group strikingly well. After highlighting the central elements that build epistemic communities, the concept will be applied to PMSCs in the next section.

In one of the earliest contributions to this topic, Haas (1992: 3) identified an epistemic community as a “network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue-area”. The members of the network share normative, principled and causal beliefs, notions of validity, and a policy enterprise (Haas, 1992: 3). In periods of uncertainty, states may require information on what social reality looks like or on the possible outcomes of actions. This information might be provided by epistemic communities and is “the product of human interpretations of social and physical phenomena” (Haas, 1992: 4).

Epistemic communities may share characteristics with other social groups such as interest and lobby groups, advocacy networks and communities of practice, but are distinguished from them by their “recognized expertise” (Haas, 1992: 16) and “expert knowledge” (Cross, 2013: 142), even if they also seek to translate their policy-relevant knowledge into policy influence (Meyer and Molyneux-Hodgson, 2010). Epistemic communities need not necessarily be limited to scientific groups. The shared ‘professionalism’ acts as the primary cement between members of the group because, as Cross (2013: 158) has argued, “[t]he main point is not whether the knowledge has definitely been proven or not, but rather whether it is socially recognized”. Next to recognised expertise, internal cohesion is another defining characteristics of an epistemic community. An internally coherent group more easily gains influence (Cross, 2013: 148-149). This internal cohesion is facilitated by the professionalism of the members of the epistemic community and is more important in determining

their influence than is the nature of their knowledge, whether scientific or non-scientific (Cross, 2013: 149-150). Major variables of this professionalism are “(1) selection and training; (2) meeting frequency and quality; (3) shared professional norms; and (4) common culture” (Cross, 2013: 150). In this respect, epistemic communities are not unlike communities of practice (cf. Wenger, 1998).

Under conditions of uncertainty, when adequate information to assess a situation is scarce and when an evaluation of the consequences of policy choices is not straightforward (George, 1980: 26-27), epistemic communities are a source of information policymakers can turn to for advice. The epistemic community literature aims to explain the genesis of state interests, state behaviour and international institutions in an uncertain international environment (Adler and Haas, 1992: 367). Under conditions of uncertainty (Cross, 2013) - and especially when technical complexities hamper its understanding by decision makers - epistemic communities can exert considerable influence on the policymaking process. In this respect, Adler and Haas (1992: 367) see ‘interpretation’ as the missing link between international structures and human volition. Under conditions of uncertainty, state interests and the ways to promote them are not necessarily clear. In addition, in times of crises, shocks and turbulence, the location of power may be obscured and existing procedures and institutions may become outdated (Haas, 1992: 14). Notably, power is not absent in this model of policy coordination, but instead of referring to the availability of material resources, it is reconfigured to include “control over knowledge and information”, viz. a form of social power (Haas, 1992: 2, 17). This is very similar to what Barnett and Duval (2005: 3-4) call “productive power”. Still, Haas (1992: 2) accords a central role to decision makers, who ‘identify’ state interests and consequently decide on the actions to satisfy those interests. This ‘identification’, however, is itself based on the representation of the issues by experts; and of the understanding of these representations by policy makers. In this view, epistemic communities are an option policymakers can turn to in the course of a decision-making procedure. We must note that technical issues frequently become objects of political debate, as even those issues involve the distribution of limited resources and thus evolve into “complex and nontechnical issues centering around who is to get what in

society and at what cost?” (Haas, 1992: 11). Elsewhere, Haas (2004: 572) also argues that no scientific theory is above suspicion as scientific findings might be guided by the opportunities of funding<sup>31</sup> and, more fundamentally, because scientists are embedded in a “cultural discourse”. Furthermore, Haas (2004: 573) complains that science does not escape politicisation, but is instrumentalised and possibly infiltrated by its users. He (Haas, 2004: 573) invokes the concept of “usable knowledge”, at the core of which is an element that makes this knowledge “usable for policymakers”. Usable knowledge, I maintain, does not necessarily originate from scientific communities. Edelenbos et al. (2011: 676), for instance, show how, faced with complex decision-making situations, policymakers, experts and stakeholders “co-produce” knowledge. In these situations, “suppliers” of knowledge compete with each other “to prove the significance and authority of their knowledge” (Edelenbos et al., 2011: 676). King’s (2005) analysis of the role of epistemic communities in central bank reform in the UK shows that the role of epistemic communities is crucial for understanding the road to operational independence of the Bank of England. Neither the pressure of lobby groups, nor the desire for cabinet stability within the government can explain this policy. However, King (2005: 115) adds that the mere existence of an epistemic community in uncertain times is insufficient to explain policy change and that only in combination with perceived electoral gains for the ruling party the ideas of an epistemic community are picked up by the government. This suggests that power listens to truth (cf. Haas, 2004), when truth is in the interest of power. Usable knowledge, in the sense used here, and somewhat different from Haas’ use of the term, is knowledge that offers perceived net benefits for political decision-makers. Unusable knowledge is knowledge that makes rival claims to truth, but that offers less promises for policymakers. When, as for instance in normative discussions, two communities make rival and equally plausible claims to knowledge, it is frequently the option that is most usable that will win out. The negotiation on the future regulatory framework of the PMSC industry can be conceptualised as an instance of coproduced knowledge between experts, bureaucrats and civil society. An important component of the domination of the experts’ (PMSCs) proposal is the benefits it offers to policymakers.

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<sup>31</sup> Funding agencies have a considerable leverage on the production of knowledge.



If the decisions in one state spill over to other states, this can lead to international policy coordination and even institutionalisation. Since many communities are of a transnational nature, the epistemic community approach transcends the strict separation between domestic and international politics (Adler and Haas, 1992: 367). Even though the international distribution of power as well as domestic power relations still surround their functioning and impact; epistemic communities suggest a “nonsystemic origin for state interests” and offer possibilities for cooperation outside established power relations (Haas, 1992: 4). Adler and Haas (1992: 373-374) use the metaphor of evolution to provide insight into the policy impact of epistemic communities, which leads them to a four-step model of policy evolution, starting with policy innovation, over diffusion, to selection and eventually persistence. Adding to this metaphor Putnam’s conceptualisation of international politics as a “two-level game”,<sup>32</sup> they arrive at a framework for international policy diffusion in which epistemic communities play a double role as both the source and the distributors of policy innovations (Adler and Haas, 1992: 373-374).<sup>33</sup> After the diffusion process, in which members of the epistemic community directly and indirectly present their ideas to key players on the (inter)national scene through various channels of communication; new ideas arrive at the policy selection stage (Adler and Haas, 1992: 378-382). It is at this stage that Adler and Haas (1992: 381) accord most importance to the input of policymakers. When policymakers are confronted with new phenomena, epistemic communities’ capacity to frame issues and identify interests is greatest. When policymakers are familiar with an issue, they can fall back on existing procedures and institutions and might give preference to epistemic communities who further their political project (Adler and Haas, 1992: 381). In other words, the more familiar decision makers are with an issue, the more epistemic communities risk being instrumentalised by those decision makers to gain political advantage. In the last step of the policy evolution model,

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<sup>32</sup> Putnam (1988: 434) sees international politics as composed of two levels: at the domestic level, diverse groups compete for influence while at the international level governments seek to safeguard their sovereignty.

<sup>33</sup> Drawing on insights from cognitive psychology, Haas (1992: 28-29) stresses the “conditioning role [of] prior beliefs and established operating procedures” in determining the interpretation of and reaction to new situations. This grants epistemic communities considerable room for manoeuvring to frame new issues in certain ways and thus to shape subsequent actions.

“[n]ew ideas and policies, once institutionalized, can gain the status of orthodoxy”, depending on the authority of the epistemic community in case, which, in turn, is partly a function of the internal consensus and cohesion of the epistemic community (Adler and Haas, 1992: 384).

The epistemic communities model sheds light on the dissemination of ideas and tries to explain why some ideas more successfully inform policymaking than others. Ideas do not originate in a social vacuum, nor do they reproduce themselves. Central in the dissemination of ideas are epistemic communities as carriers of ideas or as “cognitive baggage handlers as well as gatekeepers governing the entry of new ideas into institutions” (Haas, 1992: 27). Epistemic communities can thus be the source as well as the medium of policy diffusion. If members of an epistemic community simultaneously possess policymaking authority they can directly implement their ideas. If not, they can resort to socialisation to influence policy makers (Adler and Haas, 1992: 374).

On some of the above issues, the literature on epistemic communities shows resemblance with, and can be supplemented by the literature on the life cycle of norms. The next chapter will show how PMSCs have used their epistemic power to contribute to the shaping of new international regulatory instruments, and have concomitantly and deliberately constructed both a new image and a modification of the normative environment.

#### 4.4 Epistemic PMSCs

This section shows how PMSCs come close to the model of an epistemic community sketched above. Building upon the notion of epistemic power, it calls into question the prevailing model of states as the central decision-making institutions in the domain of security provision. While some authors have tried to preserve this decision-making capacity of states by making appeal to the analogy of “steering” and “rowing” (Osborne and Gaebler, 1992, Crawford 2006),<sup>34</sup> the epistemic communities literature problematizes this strict boundary.

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<sup>34</sup> Crawford (2006: 453) compares regulatory activities to steering. By “setting the course, monitoring the direction and correcting deviations from the course set” governments can steer the provision of security. Rowing then becomes that aspect of

Epistemic communities can work on two levels of actions, either cognitive or practical (Antoniades, 2003: 28). I will argue that PMSCs have succeeded in using their practical knowledge as leverage to produce cognitive knowledge. Being thought communities, epistemic communities

have the power to impose particular discourses and particular worldviews on societies. This power goes beyond the ability of A to get B to do something that B would not otherwise do. Additionally, it goes beyond the ability to set the rules of the game and the agenda. The ability to impose a discourse includes the ability to influence people's and collectivities' self-understanding (identity formation) and therefore their understanding about their wants and interests; this includes the ability to influence the knowledge and ideas comprised within social structures [...] They have the power, in other words, to create new understandings, and influence the evolution of the existing intersubjective understandings of which reality, and thus world politics, consist (Antoniades 2003: 28-30).

In situations of complex decision-making, epistemic communities can influence policy outcomes in an indirect way, through three mechanisms: by advising or providing information to the eventual decision-makers, through agenda-setting or through working out the practical details or implementation of a policy (Antoniades, 2003: 33). The intimate interlock of power and knowledge means that power and knowledge are two sides of the same coin. In the power/knowledge framework of Antoniades (2003: 37), power underlies the different manifestations of the epistemic, but also "draws its substance from" the epistemic. Social reality, as a social construct, depends on the availability of social knowledge and "[c]onsequently, the production of socially legitimate knowledge is politics, and politics is the legitimisation of (some) knowledge" (Antoniades, 2003: 37). PMSCs, in a coalition with government decision-makers

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"service provision [...] concerned with policy implementation and on-the-ground delivery of services" (Loader, 2000: 341).

were more successful in this enterprise than civil society. Opposing a narrow view on power that still views PMSCs as “tools” at the disposal of states (that are seen as paramount decision-makers), Leander (2005: 804-806) makes a case for a comprehensive conception of power in which PMSCs are actively shaping those policies, rather than merely implementing state security policies. In the tradition of Buzan, Waever and de Wilde (1998), PMSCs might be considered securitisation actors. As such, they have not only shaped security discourses, but also (and more fundamentally), “security understandings” (Leander, 2005: 804). As securitisation actors, PMSCs not only contribute to securitisation, or to the identification of existential threats; they also shape the most appropriate solutions to these threats, contributing to a process in which “security is not only *privatized* but also *re-militarised*” (Leander 2005: 804).

While the formal decision-making power on the use of force and on the formulation of contractual stipulations might remain in state hands, PMSCs have informally challenged that power (Leander, 2005: 807). States not only have to share their control powers over PMSCs with other market actors, most notably shareholders; they are also closely intertwined with major PMSCs, so that PMSCs sometimes have a voice in state policymaking (Leander 2005: 808). The latter is the result of active lobbying and of the revolving door between government and PMSCs’ boards of directors (Schreier and Caparini, 2005: 90). Leander (2005: 809-810) further moves beyond a formalistic view of power in two ways. First of all, PMSCs possess a significant leeway in implementing contractual provisions as “street bureaucrats”. Implementing contractual stipulations inevitably implies interpreting those stipulations and translating them into actual outcomes (Leander, 2005: 809-810). This function of street bureaucrats is illustrated by Berndtsson’s (2012: 314) analysis of private security contractors employed by the Swedish government to protect its embassies. Contractors are selected on the basis of their knowledge of the local political and cultural situation and language and the contractor, as a security expert, has “a substantial and direct impact on decisions and security governance at the Swedish embassies” (Berndtsson, 2012: 12-13). This dependence of states upon private contractors invariably implies an element of good faith in the ability or willingness of the contractor to fulfill his obligations (Berndtsson, 2012). Secondly, Leander (2005: 811) proposes a more epistemic

or constructivist notion of power, understood as the power to shape security discourses and the “knowledge of actors”. In addition, a constructivist analysis of contemporary security practices can elucidate “to what extent PMCs are (dis)empowered by the evolving ‘logic’ (*sens* for Bourdieu) of the field of legitimate security expertise” and how this expertise grants them the authority “to speak” in the security field (Leander, 2005: 811-812). As security experts<sup>35</sup> (Huysmans, 2006: 9), PMSCs might directly influence decision makers by providing information and by setting the agenda, or they might exert influence more indirectly by shaping security actors’ preferences and identities (Leander, 2005: 812- 819). Private contractors increasingly provide consultancy and intelligence services to government agencies (Chesterman, 2008). More than just offering raw intelligence data, PMSCs also analyse those data and are thus paramount in sketching the security environment. In other words, they are central producers of security discourses (Leander, 2005: 813). The information advantage of PMSCs makes states depend on them for the provision and analysis of intelligence and for structuring the information based on which they decide on their security strategy (Leander, 2005: 813-814). When more than two thirds of the US intelligence budget flows to PMSCs and an equal proportion of the Counterintelligence Field Activity staff and more than 50 per cent of Defence Intelligence Agency personnel are actually contractors (Chesterman, 2008: 1056); it might be argued that states depend upon PMSCs for the major part of their intelligence analysis. This has indeed led a senior executive from the US Office of the Director of National Intelligence to observe that “[w]e can’t spy if we can’t buy” (Chesterman, 2008: 1055). Furthermore, private contractors are engaged in the training of military personnel in various service branches, although admittedly to a different extent. In the UK, private companies train pilots for diverse divisions of the Royal Air Force and, in Germany, part of the training of Eurofighter pilots has been outsourced (Krahmann, 2005b: 280, 283). In the US, pilot training has been partly outsourced since the Second World War; but since the 1990s and continuing in the early 2000s, the US also experiments with outsourcing parts of the Army Reserve Officer Training Corps, first to MPRI, later to COMTek (Avant, 2005:

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<sup>35</sup> Huysmans (2006: 9) sees security experts as “professionals, that gain their legitimacy of and power to define policy problems from trained skills and knowledge and from continuously using these in their work”.

116-120). Although the instructors provided by these private firms go through a more or less standardised socialisation process<sup>36</sup> (due to the legal requirement that they should not be retired for more than two years); this may nevertheless reduce functional, political and social control by governments on its armed forces (Avant, 2005: 138-142).

For all of the above, I will concur with Jones' (2006) conceptualisation of PMSCs as an epistemic community. Going beyond his prescriptive argument and in light of the above, this text also argues that the concept of an epistemic community is helpful in a descriptive analysis of PMSCs. We have seen how the complexity of the new security environment has opened up opportunities for a redefinition or re-articulation of security threats. In identifying what counts as a security threat, and especially in formulating an appropriate response, epistemic communities can free states from the "bureaucratic constraints of intergovernmental competition", leading to what are perceived as objectively optimal solutions (Jones, 2006: 358). PMSCs' success in gaining a military advantage for their clients<sup>37</sup> credited them with a "pragmatic legitimacy" that demonstrated their functional usefulness (Elms and Philips, 2009: 411) to be preferred over incapable national armed forces. In this respect, it is worth dwelling for a moment upon the different types of legitimacy. Suchman's (1995) distinction between pragmatic, cognitive and moral legitimacy helps explain why some norm entrepreneurs enjoy greater success in their effort to reconstruct existing norms. Pragmatic legitimacy, for Suchman (1995: 578), bases the support for a policy on its expected utility for a specific audience. Moral legitimacy denotes that an action or institution is normatively acceptable.<sup>38</sup> This

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<sup>36</sup> For instance, COMTek's website states that "COMTek provides highly qualified contract employees to train these future leaders at over 277 colleges and universities across the country. We place Army Retired, Reserve, National Guard, IRR Officers and NCOs into ROTC units and headquarters as Military Science Instructors, Administrative Technicians and Staff Specialist (SS)". <<http://www.comtechnologies.com/comtek-services/training-support-services/arotc.html>>, (accessed 01/07/2014).

<sup>37</sup> E.g. Executive Outcomes for the government of Sierra Leone in the civil war of the 1990s; and MPRI for the Croatian governments in the final stages of its war for independence in the mid 1990s (Avant, 2005).

<sup>38</sup> Normative judgments "usually reflect beliefs about whether the activity effectively promotes societal welfare, as defined by the audience's socially constructed value system. Of course, this altruistic grounding does not necessarily render moral legitimacy entirely "interest-free" (Suchman, 1995: 579).

moral legitimacy can hinge upon consequentialist, procedural or structural elements (Suchman, 1995: 579-581). Legitimacy for consequentialist reasons arises when the output of an action or institution promotes some kind of social welfare, while procedural legitimacy derives from reaching those outcomes through “socially accepted techniques and procedures” (Suchman, 1995: 580). Structural legitimacy results from the compatibility of the practices with existing normative structures (Suchman, 1995: 581). Cognitive legitimacy does not imply a normative judgment, but the obviousness and comprehensibility of the institutions. For organisational activity to be “predictable; meaningful and inviting”, it should be compatible with existing cultural models, viz. the new institutions should become thinkable and understandable. Suchman (1995: 584-585) adds that pragmatic and moral legitimacy depend on discursive evaluation because the cost-benefit analyses at the heart of pragmatic legitimacy and the ethical analyses at the base of moral legitimacy are arrived at through “explicit public discussions”.

The claim of PMSCs to pragmatically legitimate security expertise is accepted and reproduced by their clients, who otherwise would not want to buy (Leander, 2010: 473-474). Initially, PM(S)Cs gained pragmatic legitimacy mainly for two audiences, multinational corporations working in unstable environments and elites of African conflict-ridden states (Baum and McGahan, 2013: 6). This pragmatic legitimacy is intimately connected to cognitive legitimacy. As private companies working in a neoliberal ideological environment, PMSCs have an advantage over public agencies. By default, market actors are considered more efficient, and this assumption pre-empts critique because existing accounting criteria favour PMSCs (Leander, 2010: 476-477). Of course, PMSCs are aware that their corporate image is crucial for their perceived legitimacy and consequently for their business opportunities (Jones, 2006: 360-361). In a quest for “moral legitimacy” (Elms and Phillips, 2009), they have succeeded in creating an image of security professionals. Furthermore, they have deliberately cultivated the ideal of a scientific community. A good example is the International Stability Operations Association (ISOA). While it is hard to analytically pin down ISOA, (formerly known as the International Peace Operations Association), the Association promotes the industry as “the

bellwether of change in the stability operations community, ushering in the latest ideas and innovations” (ISOA website, 2014).<sup>39</sup> ISOA brings together PMSCs and non-governmental organisations from over the world and, as such, it offers network opportunities to its members. It further publishes a “Stability Operations Magazine” in which experts and practitioners of government, civil society and the private sector as well as academics discuss relevant security-related issues. In addition, the ISOA Annual Summit brings together academics, industry and government representatives to discuss developments in the security domain.<sup>40</sup> In 2006, moreover, IPOA staff established the non-profit Peace Operations Institute (POI) that aimed at “educating the public about peace and stability operations, and to promoting practical solutions to peacekeeping operations” (POI Website, 2014).<sup>41</sup> The POI’s educational activities include research on peacekeeping practices, creating networks among stakeholders in the security industry and publishing reviews of the industry. For the British case, we can observe that Andy Bearpark (director-general of the British Association of Private Security Companies (BAPSC)) and Sabrina Schulz (its director of policy) have contributed an article entitled “The Future of the Market” to Chesterman and Lehnardt (2007). In an attempt to gain further credibility, PMSCs have also tried to ‘bridge’ the gap between themselves and national armed forces by hiring ex-military personnel trained by Western armies (Baum

<sup>39</sup> The International Stability Operations Association comes closest to this ideal-type of an epistemic community. ISOA aims, among others, to “[p]romote high operational and ethical standards of firms active in the peace and stability operations industry; [and t]o engage in a constructive dialogue and advocacy with policy-makers about the growing and positive contribution of these firms to the enhancement of international peace, development and human security”. (ISOA website, 2014) <<http://www.stability-operations.org/?page=Advocacy>>, (accessed 01/07/2014).

ISOA claims to represent “the expertise” of the private military and security community and wants to speak for the industry. (<<http://www.stability-operations.org/?page=History>>). However, ISOA is hard to pin down analytically and does not facilitate such an analysis since it offers no unambiguous picture of what kind of organization it is. It merely characterizes itself as “a global partnership of private sector and nongovernmental organizations” (<<http://www.stability-operations.org/?page=About>>).

<sup>40</sup> Last year’s program can be found on <[http://c.ymcdn.com/sites/www.stability-operations.org/resource/resmgr/AnnualSummit/AS13\\_Agenda\\_FINAL.pdf](http://c.ymcdn.com/sites/www.stability-operations.org/resource/resmgr/AnnualSummit/AS13_Agenda_FINAL.pdf)>, (accessed 01/07/2014).

<sup>41</sup> Cf. <[http://peaceops.org/poi/index.php?option=com\\_content&task=view&id=12&Itemid=26](http://peaceops.org/poi/index.php?option=com_content&task=view&id=12&Itemid=26)>, (accessed 01/07/2014).



and McGahan, 2013: 15). For Jones (2006: 363), the military provider firms identified by Singer (2003) are essentially an epistemic community since they are the “depository of military expertise from a variety of states”. The use of PMSCs by the UN and other international organisations, and the authority PMSCs gain from this can lead to an agreement on “shared causal beliefs” and can grant PMSCs a normative influence on “policy formulation and implementation”. In turn, this can stimulate human security and the prevention of conflict (Jones, 2006: 363-365). By limiting the analogy between epistemic communities and the PMSC community to a normative level, Jones underestimates the potential of the epistemic community of the private military and security industry as an explanatory factor for the rise, regulation and institutionalisation PMSCs. Epistemic communities can indeed decisively shape the institutional, regulatory and normative framework of an economic sector. Therefore, Kogut and MacPherson (2008), for instance, resort to epistemic communities as the independent variable in explaining the diffusion of privatisation as an economic policy.

PMSC power thus goes beyond formal lobbying and negotiating the terms of a specific contract and also happens on a more ‘epistemic’ level, since PMSCs offer very attractive ‘usable knowledge’ to state decision-makers. This might even happen to such an extent that PMSCs can set the agenda and shape the identity and preferences of actors in the security field, for instance through the presentation of the threat environment, state interests and the appropriate state policy. This is true, even if the underlying intention is to sell their own products and services (Leander, 2005: 817-819). Moving to a more structural level of power analysis, Leander (2005: 820) furthermore argues how PMSCs contribute to a more and more technical and military framing of security expertise and that the debates on security are

moving out of the public realm into a restricted sphere where the executive, the military, the secret services and PMCs can decide how issues should be defined and handled. Correspondingly, it diminishes the presence of governmental (legislative assemblies, diplomats and foreign affairs/state departments) and

civil society (media, NGOs, think tanks) voices that would be expected to contest the consequent militarization of security issues.

#### 4.5 Reframing PMSCs

PMSCs have deliberately cultivated an identity of security experts and security professionals, of “technical and military experts”, alongside identities of “professional businessmen, noble humanitarians and proud patriots” (Kruck and Spencer, 2013: 332). For instance, Higate’s (2012) symbolic interactionist analysis of the memoirs of British security contractors in Iraq shows that these contractors consistently emphasise their professionalism, thus positively contributing to the legitimacy of the overall industry. Indeed, their identity impacts their public perception and, consequently, their perceived legitimacy (Krahmann, 2012). In the world risk society, security experts help people to make sense of their security environment and devise the appropriate responses to a multitude of risks and threats (Berndtsson, 2012: 303-304). To secure a contract, PMSCs must therefore convince their employer of their superior “specialised competence” with regard to public sector security providers (Berndtsson, 2012: 307). As security experts, PMSCs are thus not only co-framing and co-staging security issues (Berndtsson, 2012: 304), they have also become increasingly indispensable for states to achieve their security objectives. This particular combination on PMSC expertise and state reliance of PMSCs, explains why PMSCs have become widely accepted as security professionals.

What is more, their status as security professionals also helps to explain the inapplicability of mercenary conventions to PMSCs, as discussed above. Not only have the International Committee of the Red Cross (ICRC) and the UN Special Rapporteur on the Use of Mercenaries discursively reconstructed private security providers to differentiate PMSCs from mercenaries; this reconstruction has also created a “discursive opportunity for the development of new international regulations that endorse the legality and legitimacy” of PMSCs (Krahmann, 2012: 345). From a discourse-historical point of view, Krahmann (2012: 344) thus recounts how PMSCs have cast off their mercenary reputation

and have become legal and legitimate. Legal concepts are social constructs *par excellence* and their interpretation at a given moment in time depends on the outcome of a discursive struggle (Krahmann, 2012: 347). Due to the discursive reconstruction and reinterpretation of the definition of a mercenary, PMSCs did not subsume under this category and new legal categories needed to be designed. A strict reading of the First Additional Protocol might have subsumed PMSCs in recent conflicts, most notably Iraq and Afghanistan, under the mercenary label. However, to avoid this, Krahmann (2012: 352) argues, “the ICRC modified its construction of mercenaries”. The historical context of the drafting of the First Protocol in the 1970s, most notably the postcolonial wars for independence, significantly differed from the wars fought by multinational coalitions in Iraq and Afghanistan. Not only did the historical circumstances change, also the ICRC changed its discourse. To differentiate PMSCs from mercenaries, the now focused on PMSCs’ “responsible command” and their delivery of services “with a positive connotation such as defence and protection” (Krahmann, 2012: 354-355). The changing ICRC discourse prevented the application of the existing mercenary definitions of Additional Protocol I (Krahmann, 2012: 355). Since the discourse of the UN Special Rapporteur on Mercenaries and its successor, the Working Group on Mercenaries (established in 2005) showed a similar evolution, the application of existing mercenary conventions was compromised, and a new regulatory framework was called for (Krahmann 2012: 355-356). The ‘coup de grâce’ to the applicability of the mercenary conventions to PMSCs was given by the Draft UN International Convention on the Regulation, Oversight, and Monitoring of Private Military and Security Companies, which dropped any reference to the term ‘mercenary’ (Krahmann, 2012: 361).

The next chapter will delve deeper into the recent and current discursive struggles on the future regulation of PMSCs. It will review how PMSCs have used their status as security professional to gain a decisive voice in the formulation of the newly developing regulatory framework.

## 5. Road to Regulation

In 1997, the international community, through UN Secretary-General Annan, expressed its reluctance to engage with private military companies (which were still more or less consistently referred to as ‘mercenaries’), in the crises in Sierra Leone and the Great Lakes Region. At that time, Annan was not able to make “a distinction between respectable mercenaries and non-respectable mercenaries” (UN, 1997),<sup>42</sup> hence the firm rejection of mercenaries and PMCs altogether. A decade and a half later, the UN makes “widespread” use of PMSCs (Østensen, 2011: 40). For some countries, the PMSC industry has evolved into an “essential, inevitable and international” industrial sector (Miliband, 2009: 5). What explains this shift from a reluctant and even “abolitionist” (Chesterman and Lehnardt, 2009: 1), normative attitude towards PMSCs to a receptive and positive stance? That is one of the questions in the debate on the appropriate organisation of military force spurred by the incongruousness of the existing normative dislike of mercenaries with the emergence of very similar PMCs. In the last decade, this debate revolved around multifarious initiatives on the future governance of the private military services industry. However, if the anti-mercenary norm is as strong as sometimes propagated (cf. Percy, 2007b), then why did these recent regulatory initiatives not arrive at a strengthening of existing anti-mercenary conventions rather than at the *de facto* legitimisation of the industry? In other words, why did PMSCs become legitimate private providers of security?

This chapter will apply insights from the cycle-theory of normative change to explain the process of legitimisation of the private military industry. It corresponds to the argumentative stage in the cycle of norm change, where participants to the debate or the norm negotiators offer arguments in defence of a particular normative stance. We can compare it to a legitimisation process, as a deliberate effort to convert the “existing” into the “acceptable” (Baum and McGahan, 2013: 7). The previous chapters have shown that only a combination of material and normative factors can account for the scope and timing of the disappearance of

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<sup>42</sup> The transcript of the press conference (on 12 June 1997) by the Secretary-General can be found at <<http://www.un.org/news/Press/docs/1997/19970612.sgsm6255.html>>, (accessed 01/07/2014).

mercenary armies in the nineteenth century. Without taking into account the relevant normative framework, the historical manifestation of the organisation of military force is difficult to understand. Existing accounts of the emergence of contemporary PMSCs, however, seem to ignore this normative dimension. Despite acknowledging the decisive role of the neoliberal ideological environment, they predominantly focus on material factors, to the extent that supply and demand of military force becomes the main explanatory variable (Singer, 2003, Avant, 2005). Should we then dismiss the moral reluctance towards mercenaries as irrelevant in the case of PMSCs? In recapitulation, mercenaries were morally disapproved of because they use force outside legitimate control and because they are motivated primarily by selfish, financial reasons to resort to the use of force, instead of by the common good (Percy, 2007a). It is difficult to see how this moral disapproval would not apply to PMSCs as private, for-profit enterprises that offer military and security services and that are driven by a “market oriented logic of action” (Branovič, 2011: 5).

The state has successfully subsumed the above two requirements under its monopoly on legitimate violence. State sovereignty implies that within territorially demarcated borders, the state holds “supreme authority” (Barkin and Cronin, 1994: 111) and is the only institution that can legitimately use violence. This concept of state sovereignty, essentially a social construct (Biersteker and Weber, 1996), has pervaded international politics to such an extent that only sovereign states possess the “proper legitimate authority to wage war”, both in a moral as in a legal sense (Reitberger, 2013: 64). Even in the case of the use of force by an international organisation such as the UN (with the veto-right of the permanent members of the security council and the voluntary nature of national contributions to peacekeeping missions) and by a supranational organisation as the EU (with its formally intergovernmental foreign and security policy (Sjursen, 2011: 1082-1083)); decisions to act militarily can be traced back to the national decision-making level. Similarly, while mechanisms of appropriate control of armed forces might be imagined at a supra-state level, traditionally the responsibility to control armed forces falls to the state.

However, as we saw, PMSCs and other non-state actors have launched a challenge to the state monopoly on legitimate violence, which led to the

reformulation of that monopoly. Now, the aim of the current British policy towards PMSCs is to reach a state of “effective voluntary regulation” of the industry (Simmonds, 2012). Self-regulation can be understood, following De Nevers (2010: 220), as the voluntary governance of an economic sector in which private actors develop binding guidelines “outside the governmental decision-making arena”, that exceed existing regulation. So the UK government will basically ‘anchor’ the self-regulation of the industry. This implies that the state retreats to a position of meta-governance (Kooiman, 2003, Sørensen and Torfing, 2009). Within the limits set by civil and criminal law, non-state actors are thus free to hire PMSCs and to authorise the potential use of force. When non-state clients hire PMSCs, the state leaves both the rowing and the steering to non-state actors (in the metaphor of Osborne and Gaebler (1992)).

In addition to this self-regulation, the regulatory framework consists of the Montreux Document (that recalls existing state obligations), and the International Code of Conduct for Private Security Providers. This chapter will demonstrate that the development of the new regulatory framework for PMSCs was not the result of the deliberate construction of a new norm. Instead, it emanated from an attempt to safeguard the outsourcing and privatisation practices of states and other PMSC clients against the criticisms generated by the notorious abuses that were delegitimising the industry. Following functional and political economic reasons, states were thus driven to outsource and privatise parts of their security and defence functions (Kruck, 2014). From a functionalist point of view, states use PMSCs as security experts “for the effective and cost-efficient pursuit” of their security goals in a highly technological and changing security environment (Kruck, 2014: 115). To entrench these practices against the objections of mostly NGOs and academics who uncovered the “culture of impunity” of the industry (Human Rights First, 2008), states consequently had to balance the functional usefulness of the industry with these legitimate concerns. On the one hand, a perceived lack of legitimacy and accountability of the private military industry did not only provoke NGO criticism, but more directly undermined the effectiveness of military operations in Iraq. The US-led counterinsurgency efforts in Iraq (between 2003 and 2007) were seriously hampered by the lack of support from the local population that resulted in part from irresponsible behaviour by PMSC

personnel<sup>43</sup> (Thurnher, 2008). On the other hand, this lack of legitimacy also denies PMSCs market opportunities. Blackwater provides an illustration of this last observation as it currently performs under the name Academi, after having been renamed Xe Services only in 2009. Both name changes were due to the negative image that hampered attracting new contracts.<sup>44</sup> The above shows that both governments and PMSCs were united in a strive towards the legitimization of the industry. In the UK, this coalition of interests forms the core of the influence of PMSCs and their authority in the debate on the future regulation of PMSCs. While civil society participants may have brought valid arguments to the table, these were less 'usable' for state decision-makers. That is, the promises they made were less certain to produce beneficial outcomes.

This chapter traces the process towards the new regulation, and *de facto* legitimization, of PMSCs. It shows how the norms against private violence and on the state monopoly on violence have shaped, and were themselves reshaped by, the interaction of diverse norm entrepreneurs. The processes described in this analysis resemble a cycle of norm change: a period of uncertainty (cf. chapter four) opened up an opportunity for diverse political and norm entrepreneurs to create a new governance framework. This is the stage this chapter focuses on. If we accept legal stipulations as the reflection (Thomas, 2001) and formal codification (Sandholtz and Stiles, 2009: 1) of norms, or as "efforts to harness the independent regulatory power of social norms" (Posner, 2002: 8); a closer look into the formal process of drafting the new regulatory framework should reveal which norm entrepreneurs have decisively influenced the regulatory outcome. Following this reasoning, I will conceptualise the recent governance initiatives as the result of a discursive negotiation between diverse political and norm entrepreneurs. This conceptualisation resembles Steffek's (2003) discursive approach to the legitimization of international governance. Steffek (2003: 267) sees international governance as a "negotiated consensus on the scope, the principles and the procedure of the regime" which is subsequently legitimised through a process of legal-rational (cf. Weber, 1978) justification. Steffek (2003: 263) adds that legitimate governance

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<sup>43</sup> Most notably the Falluhja killings by Blackwater employees in 2007.

<sup>44</sup> Ukman (2011) 'Ex-Blackwater firm gets name change, again.' <[http://www.washingtonpost.com/blogs/checkpoint-washington/post/ex-blackwater-firm-gets-a-name-change-again/2011/12/12/gIQAxf4YpO\\_blog.html](http://www.washingtonpost.com/blogs/checkpoint-washington/post/ex-blackwater-firm-gets-a-name-change-again/2011/12/12/gIQAxf4YpO_blog.html)>, (accessed 01/07/2014).

characteristically involves a “rational exchange of arguments” that will lead rational participants in the debate to reach an agreement. This model shows similarities to the process through which the private military industry has recently been governed. However, Steffek’s (2003: 251) view on legal-rational governance as the “institutionalization of rational communication about means, ends and values” might overstate the rationality of the exchange of arguments and ignore the material resources that underlie every successful attempt to participate in the debate. Steffek’s account heavily draws on Habermas’ (1988: 105) notion of “communicative rationality”, which designates how norms are rationally agreed upon after argumentation and deliberation. While recognizing the validity of the negotiation approach, Elgström (2000: 458) argues that this logic of communicative action is only one of two analytical logics to make sense of norm spread. A second logic is the “logic of instrumentality rationality”, in which “calculations about utility maximization” guide behaviour (Elgström, 2000: 450). Indeed, the remainder of this chapter shows that indeed this instrumental rationality has guided norm negotiations on the PMSC industry. In this respect, the coinciding interests of PMSCs and state decision-makers proved decisive for further norm negotiations. In other words, norm negotiations do not take place in an ideal-speech situation, where the arguments are considered rationally and where the most convincing argument eventually prevails.

Section 5.1 traces the process of the British approach of self-governance of the industry. In the patchwork of international humanitarian law, human rights law, mercenary conventions, contract law and self-regulation, national approaches cannot be seen in separation from international initiatives. Therefore, section 5.2 delves deeper into the development of the Montreux Document, while section 5.3 analyses the International Code of Conduct for Private Security Providers, an industry initiative. Let us briefly recall that these initiatives emerged against a similar international background. The first PMSCs, (then called PMCs), emerged in an uncertain international environment, closely after the collapse of the bipolar world order in which traditional power relations were obscured. What is more, the most notable instances of PMC operations, - such as Executive Outcomes in Angola and Sierra Leone and Sandline in Sierra Leone and Papua New Guinea -took place in the global periphery in all but lawless societies. On a global scale, it was exactly this state of “global



ungovernance” (Leander, 2002: 1), or at least the governance in flux, that provided a fertile breeding ground for PMSCs. Yet, their unregulated behaviour posed negative corollaries for diverse actors involved.

### 5.1 British Road to Regulation

Paramount in every UK defence review in the last two decades is the uncertain political and security environment of the post-Cold War era. Another constant element is the British ambition to remain a prominent actor on the world stage. In his foreword to the 1998 ‘Strategic Defence Review’, George Robertson, then Secretary of State for Defence, expressed Britain’s ambition to be a leading “force for good” on the world stage where it would take up its responsibilities inspired by an internationalist “instinct” (UK MOD, 1998: §19). More than a decade later, in the 2010 Strategic Defence and Security Review, this ambition has not changed fundamentally. British responsibilities and ambitions remain “global”. To support them, the UK will continue to stand out as “one of very few countries able to deploy a self-sustaining, properly equipped brigade-sized force anywhere around the world and sustain it indefinitely” (Cameron and Clegg, 2010: 4). Consecutive cuts in troop levels in the 1990s and 2000s (Taylor, 2012: 227-228) and in the defence budget<sup>45</sup> of the 1990s were thus not followed by a cut in ambition. Part of the solution to cure a nascent capabilities gap was to free up resources to spend on weapon systems by reducing the number of personnel directly employed (Walker and Whyte, 2005: 652). To remedy a capabilities deficit, a matching policy was to turn to PMSCs for support activities, in the form of outsourcing or public-private-partnerships (Ortiz, 2009: 39), among which the private finance initiatives (Parker and Hartley, 2003). To translate the British ambitions into actual policy outcomes, the support of contractors is now an “essential component of the ability to both deploy and

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<sup>45</sup> In constant prices the 1990s saw a reduction of the UK Defence budget. Cf Ministry of Defence (2002): <<http://webarchive.nationalarchives.gov.uk/20140116142443/http://www.dasa.mod.uk/publications/UK-defence-statistics-compendium/2002/2002.pdf>>, NATO (2014): <[http://www.nato.int/nato\\_static/assets/pdf/pdf\\_topics/20140224\\_140224-PR2014-028-Defence-exp.pdf](http://www.nato.int/nato_static/assets/pdf/pdf_topics/20140224_140224-PR2014-028-Defence-exp.pdf)> and NATO (2012): <[http://www.nato.int/nato\\_static/assets/pdf/pdf\\_2012\\_04/20120413\\_PR\\_CP\\_2012\\_047\\_rev1.pdf](http://www.nato.int/nato_static/assets/pdf/pdf_2012_04/20120413_PR_CP_2012_047_rev1.pdf)>, (websites accessed 01/07/2014).

sustain the UK's military instrument" (Heidenkamp, 2012: 1). What is more, private sector investments are the quintessential development strategy propagated by the British Government to rebuild post war economies. This technique involves the privatisation (instead of the mere outsourcing) of military force. Enduring security threats in Iraq, for instance, drive an "ongoing requirement for private security support" (Maskell, 2013: 13). The Iraq British Business Council (IBBC), which assembles diverse trade, industry and investment sectors, has as part of its aim to "build Iraq" (IBBC, 2014) a project to which PMSCs, as "commerce facilitators" (Ortiz, 2010: 103-104) are indispensable.

Although outsourcing and privatisation in the British armed forces is not unprecedented,<sup>46</sup> its growing speed and impact (Walker and Whyte, 2005: 653) forced the government, under public pressure, to consider questions on the legality and legitimacy of PMSCs. The clarification of these issues became an urgent need since, in the mid-1990s the near-entanglement of the UK in the civil war of Sierra Leone had shown that an unregulated industry might prove harmful for British national interests. This debate can be summarized in the discussion on the UK Green Paper entitled Private Military Companies: Options for Regulation.

Throughout the Cold War, and until at least the 1980s, the British government maintained close relations with what most aptly can be labelled mercenaries (Kinsey, 2006: 43). Building upon a common history in the service of the British Army during the Second World War and on personal ties and "shared political views" between British government elites and mercenaries; an "informal network" emerged which opened up the opportunity for the British Government to covertly promote its policy interests abroad (Kinsey, 2006: 44). This informal network, combined with MI6 supervision ensured that this mercenary activity was in line with national interests (Kinsey, 2006: 44). From the middle of the 1970s onwards, a new wave of globalisation and international terrorist attacks

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<sup>46</sup> The protection of domestic military bases has already been devolved to private guards since the 1980s. In the middle of the 1980s, the Royal Ordnance Factories were also privatised, followed, at the beginning of the 1990s by the Royal Dockyards at Devonport and Rosyth (Walker and Whyte, 2005: 653).

created the environment for companies to frame their private military services as a “legitimate commercial activity” and simultaneously to retreat from the clandestine mercenary activities (Kinsey, 2006: 50-51). In addition, the mid-1980s saw private military entities assume a more or less formalised corporate structure that came to replace their previous *ad hoc* organisation (Kinsey, 2006: 64). In an effort to shake off their mercenary reputation, emerging PMCs took on a legal identity, stressed their commercial business profit objectives, and limited their dealings with governments to commercial relations (Whyte, 2003, Kinsey, 2006: 64). Although the changing security environment after the end of the Cold War forced governments to rethink their foreign policy and defence strategies, the British government did not perceive the activities of PMCs as problematic or in conflict with its own foreign policy and in the 1980s and 1990s, the interaction between PMCs and government officials still happened on a largely informal basis, without written procedural rules (Kinsey, 2006: 59-64). Since then, however, the interests of the private companies began to alienate from those of government: “while the companies sought an open relationship with the commercial world, leaving behind the secret world, government officials had not yet realized that such a shift had occurred” (Kinsey, 2006: 69). This alienation of interests explains the friction between these two partners.

#### 5.1.1 Green Paper on Private Military Companies

The Green Paper ‘Private Military Companies: Options for Regulation’ published by the Foreign and Commonwealth Office (FCO) in February 2002 finds its origins in a recommendation of the Foreign Affairs Committee in its second report on British involvement in Sierra Leone.<sup>47</sup> It was the lack of formally clarified procedural rules that led to the dubious British involvement in the internal affairs of a sovereign state (the so-called ‘Sandline’ or ‘Arms to Africa’ affair). This arms to Africa affair further involved the UK in the circumvention of a UN arms embargo to the embarrassment of the New Labour Government and its “‘ethical’ foreign policy” (Walker and Whyte, 2005: 658). The British case demonstrates that the tacit approval of private involvement in the internal affairs

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<sup>47</sup> In this report, the Foreign Affairs Committee (1998: § 96) recommends the publication of “a Green Paper outlining legislative options for the control of private military companies which operate out of the United Kingdom, its dependencies and the British Islands”.

of another state backfired against the UK's interests. Existing legislation, such as the 1870 Foreign Enlistment Act, was unable to prevent the 'Arms to Africa' affair and the 2001 Private Security Act and the 2002 Export Control Act were ill-designed to apply to PMCs (Joachim, 2010: 13-14). Rather than a deliberate strategy for the facilitation of state-corporate crime, as proposed by Whyte (2003), the impetus behind the new regulatory initiative was, in my view, the discrepancy between on the one hand the functional and political economic incentives towards hiring PMSCs and on the other hand, the existing normative framework on state sovereignty and the state monopoly on force. Not in the least, the tacit approval of PMC intervention in a sovereign state and the disrespect for the arms embargo compromised the 'neutrality' of the UK. Let us recall that it was exactly this neutrality that was the main explanatory factor in the disappearance of mercenaries (Thomson, 1994).

To avoid a repeat, the aim of the paper was to formulate options for regulating PMCs outside UK territory after a "constructive debate" (FCO, 2002: 5) with contributions from a variety of stakeholders interested in this matter, including NGOs, corporations, members of parliament and interested individuals (FCO, 2002: 27). Jack Straw (2002a: 4), then Secretary of State for Foreign and Commonwealth Affairs, acknowledges the need to rethink the role and composition of the armed forces after the end of the Cold War and especially for what is concerned the contribution of the private sector. In his foreword to the Green Paper, he confirms the previously mentioned uncertainty: "The post Cold War world has given rise both to new problems and new opportunities. In many areas, we need to test the received wisdom against an evolving post Cold War reality". The Green Paper thus sets out the contours of the debate. Underlying the paper is the recognition that reliable data on the PMC industry are difficult to obtain, which induces the FCO to base its report on estimations and secondary sources. Another *leitmotif* is the discourse on the comparative advantage of PMCs vis-à-vis the state's armed services. In his foreword, Straw (FCO, 2002: 4) consistently stresses that PMCs have a potential of realizing significant cost reductions and might allow the UN to respond "more rapidly and more effectively in crises".

In the Green Paper, the FCO (2002: 14-15) draws a sketch of the early twenty

first century private military industry and highlights some topics structuring the debate on PMCs: PMCs might hamper transparency of the use of military force and thus obscure mechanisms of accountability, particularly in comparison with the use of force by the national armed forces. The FCO (2002: 15) furthermore acknowledges that PMCs might be a threat to sovereignty, although it does not take the “extreme point of view” of then UN Special Rapporteur on the Use of Mercenaries, Ballesteros, who, based on an equation of mercenaries and PMCs, considers the latter a threat to national sovereignty, regardless of the authority that employs them. In comparison, the FCO (2002: 15) takes a more reluctant approach and attributes more importance to whether PMCs are under the control of a legitimate authority. This being said, the Green Paper also cites some examples of PMC involvement in the extraction of mineral resources to indicate that PMCs might contribute to economic exploitation and might have a “vested interest in conflict”, which might cause them to offer their services to different actors in a conflict (FCO, 2002: 16-17). On this last issue, the drafters of the Green Paper argue that reputation is a central incentive for PMCs not to switch sides or to unnecessarily prolong conflict (FCO, 2002: 17). The same argument applies to the concern on the human rights abuses of which PMCs are frequently accused. The Green Paper (FCO, 2002: 17) asks whether these abuses are “inherent in the nature of PMCs” (in which case they would be difficult to prevent), and in response repeats that reputation and future business opportunities might, on the contrary, encourage PMCs to abide by human rights law. Later in the document, the FCO (2002: 19) partly repeats this line of argument when it argues against the use of “double standards” in judging national armed forces versus PMCs, since misconduct, abuses and problems with accountability are not inherent in PMCs, but have also been documented in the case of uniformed personnel.

Against the accusation that governments frequently hire PMCs to act as proxies, the FCO (2002: 18) objects that these allegations, while sometimes true, are very hard to prove and do not constitute an argument against PMCs, but rather in favour of more transparency. The moral repugnance against fighting for financial gain is also cited as a substantial argument against the use of PMCs. However, the FCO (2002: 18) adds that these moral objections do not as such render the complete private military industry illegal, as such:

For a state under threat from armed insurgents or from criminal gangs with a military capability, the first requirement is to re-establish its monopoly on violence. The temporary use of a PMC to do this may occasionally be the only realistic option available. It may be cheaper and will certainly be quicker than attempting to train national forces (who may bring with them a risk of coup d'état).

A final consideration concerns the use of PMCs in international operations. On this issue, the FCO (2002: 20) takes into account the reluctance of the UN, but nevertheless argues for a wider debate. It concludes that, if political support could be found, the use of PMCs in international operations might circumvent two common difficulties. Firstly, it might alleviate recruitment problems for UN missions, frequently staffed with poorly trained and badly equipped forces. Secondly, contracting by the UN might circumvent some of the problems encountered by sovereign states in their contracts with PMCs.

The Green Paper subsequently proceeds into its core matter, namely an outline of the "scope for government action" (FCO, 2002: 20). Two general considerations are taken into account to make the case for regulation. First, historical experience has shown that the establishment of state control over non-state violence from the eighteenth century onwards has considerably reigned in "risks of misunderstanding, exploitation and conflict". Second, private military services do not equal ordinary commercial transactions, but carry with them significant risks for the integrity of people and for the stability in the region (FCO, 2002: 20). Apart from these observations, the case for regulation is framed in terms of direct British interests abroad. Keeping in mind the impetus to this report, namely the obscure involvement of British officials in the Sierra Leone civil war, the Green Paper argues that PMC activity abroad might interfere with British foreign policy, undermine Britain's reputation, endanger lives of British citizens and lead to a situation in which British forces might confront a British company (FCO, 2002: 21). By drawing up guidelines, a regulatory initiative "could help establish a respectable and therefore more

employable industry” (FCO, 2002: 21). The ineffectiveness of the existing international regulatory regime leads the drafters of the Green Paper (FCO, 2002: 21-22) to make a case for a regulatory system on a national basis, for which three broad options are subsequently presented.

The first option consists of a complete ban on the delivery of military services outside UK territory or, in a derived form, of banning recruitment for that activity (FCO, 2002: 22-23). This option seems the most straightforward way of dealing with these problems, but encounters a number of problems. Most notably, they concern enforcement (because British courts have to prosecute crimes taking place abroad) and the definition of the military activities concerned (FCO, 2002: 22-23). More substantially, such a ban would restrict the individual liberty of people wanting to work for PMCs and would hamper legitimate governments in hiring PMCs (FCO, 2002: 23). Last but not least, “a blanket ban would deprive British defence exporters of legitimate business” (FCO, 2002: 23). An alternative might consist in a licensing or registration regime, which would allow for the government the opportunity to prohibit certain services if contrary to its policy objectives. The third option amounts to self-regulation in the form of a voluntary code of conduct by an industry association (FCO, 2002: 26). Adherence to the code would then be seen as a sign of respectability and would enhance the reputation of the company. In this regard, self-regulation relieves the government of devising burdensome and “unenforceable” regulatory mechanisms and transfers responsibility to the industry itself, which undeniably has an information advantage (FCO, 2002: 27). However, the difficulties of self-regulation are substantial as it would fail to meet an important regulatory objective, namely to avoid that British companies damage British interests: “The lack of legal backing would mean that the Government might be compelled to watch while a company pursued a course that was plainly contrary to the public interest”. Another risk of self-regulation is that the industry association might lack sufficient resources to monitor and investigate compliance, causing difficulties if it should step up to a major member (FCO, 2002: 27).

The cost-benefit analysis of potential regulation of the private military services industry added in an annex to the Green Paper not only indicates that the proposed regulatory schemes entail various costs and benefits. It also, and

more fundamentally, characterises the tone of the Green Paper. Underlying the entire Green Paper is a consideration for the protection and promotion of British interests, both commercial and political. In this light, regulation would mean an “administrative and financial burden on both government and the private sector” (FCO, 2002: 44). Although regulation might prevent PMCs harming British foreign policy, too strict a regulation would itself undermine British commercial export interests (FCO, 2002: 45-46). The leeway for stringent regulation is therefore significantly reduced.

In reaction to the Green Paper, the Foreign Affairs Committee of the House of Commons (FAC) published a report based on oral and written evidence from a variety of organisations and individuals, from the governmental as well as the non-governmental and corporate sector. The FAC thus draws upon external sources of information and hereby acknowledges that reliable information on the PMC sector is hard to obtain (FAC, 2002: 6, §6). The FAC (2002: 7, §13) underwrites most of the suggestions of the FCO, not in the least that PMC regulation might be a tool to promote a “reputable” private military industry. On the topic of accountability of PMCs, the FAC (2002: 15-16, §41, §44) observes that PMC employees, in contrast to defence forces, are not held to an “oath of allegiance”, a “military legal code” or a transparent command structure or any other international legal instruments such as the International Criminal Court. In contrast, the testimony by Tim Spicer, former CEO of Sandline International and of Aegis Defense Services, indicated that “sufficient checks and balances could be established”, most notably by coupling national and international regulatory mechanisms, supplemented with media coverage and contractual enforcement (FAC, 2002: 15, §43). In disagreement with the UN Special Rapporteur’s 1999 report to the Human Rights Council - in which Ballesteros argued that PMCs can offer services at a high cost-efficiency because they fail to take appropriate measures to respect international humanitarian law and human rights law - PMCs themselves “argue that the vetting procedures carried out by reputable companies ought to reduce the likelihood that employees might commit human rights abuses” (FAC, 2002: 18, §58). The favourable reputation and the concomitant commercial business opportunities would, according to this logic, serve as an incentive to respect relevant legal stipulations. However, the FAC (2002: 19 §62) does not share this optimism and is “not convinced that the



checks and balances that apply to national armed forces can ever be applied with equal strength to the employees of PMCs”, partly for the reason that PMC abuse might escape public scrutiny. Still, PMCs can have a favourable impact upon an unstable situation and the FAC shares the view that a professional and properly regulated industry might stabilise a situation by creating the conditions for a more fundamental solution; although it also agrees with the Campaign Against Arms Trade (CAAT) that PMCs are incapable of fully solving the underlying political, social and economic sources of conflict (FAC, 2002: 19-20, §§63-67). The FAC (2002: 20, §§69-71) further shares the concern of the CAAT that PMCs might serve as proxies for governments to avoid public criticism and argue for transparent links with legitimate companies. The FAC thus takes the position that legitimate clients might indeed have legitimate security needs that can be resolved by PMCs.

The relation between PMCs’ actions abroad and British foreign policy objectives informs much of the discussions in the FAC report and a regulatory framework should prevent British PMCs to carry out operations in contradiction with British defence and foreign policy (FAC, 2002: 22, §§76-78). Related to this, to prevent British forces being drawn into high-risk rescue operations, the FAC (2002: 22-23, §82) proposes a “though, contract specific licencing regime, combined with a mechanism that vetted companies for competence” to drive unprofessional PMCs out of the market. The section on the consideration of the benefits of PMCs shows some friction and uneasiness with the UN Special Rapporteur, who takes the view that the protection of national sovereignty, territory and human rights is the “inalienable responsibility of the state” (FAC, 2002: 24, §83). The FAC takes a more pragmatic stance on this issue, although it has been informed by a similar motivation, namely guaranteeing the security of the citizens. In recognition of that task, the FAC (2002: 24, §84) sees an opportunity for PMCs to come into the picture, in the absence of foreign assistance from other states, international organisations, or the UN. Furthermore, the FAC (2002: 24-26, §§85-93) concedes that some services already provided by PMCs to international organisations are legitimate, for instance “security guarding, logistic support and de-mining”; and that the operational lethargy and inefficiency of the UN might be remedied by a more extensive use of PMCs, although this would probably generate negative reactions by some UN member

states. The same reasoning might apply to PMCs supporting the operations of humanitarian organisations (FAC, 2002: 26, §96). The following excerpt illustrates the frame of reference:

If regulation of the private military sector resulted in the development of a transparent, trusted industry in the United Kingdom, further commercial involvement at the low intensity end of UN peace operations might become increasingly acceptable to member states. If this helped to increase the speed and efficiency of UN reactions, to ensure the enforcement of UN Security Council resolutions, and to prevent further atrocities such as those committed in Rwanda and the Balkans in the 1990s, then such regulations should be welcomed (FAC, 2002: 26, §95).

Characteristically for the British case, PMCs might alleviate the overstretch of the British armed forces. At this point, the argument is heard that PMCs might perform some services more cost-effectively in comparison to the armed forces. Therefore, they might be suited to reduce the overstretch of the armed forces by taking over non-combat roles (FAC, 2002: 27-28, §101).

The FAC's reflection on the propositions of the FCO is shaped by their belief "that a properly regulated private military sector can make a positive contribution to international security" (FAC, 2002: 29, §102). With this in mind, the FAC is opposed to a complete ban on private military services, not only because PMCs might positively affect international security, but also because such a ban would be "counterproductive" and urge these companies to relocate overseas (FAC, 2002: 29, §102). However, partial bans on private military services, (e.g. on combat operations), might prevent PMCs from committing human rights abuses (FAC, 2002: 29, §§103-105). The option of an export license regime for military and security services on a case-by-case basis is supported as the preferred option provided it takes into account legitimate concerns of the PMC industry to decide quickly and effectively on export applications - a concern that has frequently been aired by the industry (FAC,

2002: 32, §§119-124). Consequently, it falls to the government to decide which operations and services would require a license and to issue guidelines on the permissibility of PMC operations (FAC, 2002: 31, §§117-118). On self-regulation, an option that is supported by some PMCs, the report argues that a voluntary code of conduct can help establish a company's reputation, but in and of itself is "insufficient" for the same reason mentioned previously, namely that the government would have no leverage to prevent companies from acting against British interests (FAC, 2002: 35, §137). To its discussion of the Green Paper proposals, the Report adds an alternative in the form of the creation of a "publicly funded cadre of former service personnel", who might offer non-combat services under government supervision (FAC, 2002: 35, §140).

The consequences of taking no regulatory action, in terms of damage to British political and economic interests seem so pressing that the drafters of this report argue for a "strong regulatory regime" including a general licence for PMCs, complemented with government permission for each individual contract (FAC, 2002: 40, §162). The fundamental consideration to be made by the government remains that "a strong regulatory regime would need a substantial enforcement mechanism to ensure its credibility" and this, in turn, requires significant governmental and private sector investments (FAC, 2002: 40, §163). The FAC concludes its report with a recommendation that the government should "consider very carefully how to ensure that the benefits of permitting a regulated private military sector operating from the United Kingdom are not outweighed by the costs of establishing and maintaining a regime for their regulation" (FAC, 2002: 40, §163). At its core, this is an economic consideration.

In his response to the FAC's report, Secretary of State for Foreign and Commonwealth Affairs, Straw (2002: 1) welcomes the FAC's positive judgment of PMCs, that are considered to "have the potential to make a legitimate and valuable contribution to international security". Straw therefore identifies a double aim of regulation; first, to prevent abuses and second to allow the government to "maximize the benefits that a properly regulated private military sector can bring" (Straw, 2002: 1). The FAC and the Government thus broadly endorse the same policy objective: regulation to maximize benefits. Neither the FAC nor the Government opts for a confrontational policy, but both want to

minimize the risks of employing PMCs while maximizing the benefits. In this line of thought, the Government argues against a complete ban of private military services abroad. When considering a licensing and regulatory regime, the Secretary of State repeatedly stresses the delicate task of finding a balance between ensuring effective regulation on the one hand, and avoiding an undue administrative burden for the PMCs concerned, on the other hand (Straw, 2002: 5). A similar balance must be struck between “the need for informed decision-making and client confidentiality” (Straw, 2002: 5). With regard to a voluntary regulatory code, opinions between the FAC and the government appear to diverge. The FAC holds the opinion that a voluntary code of conduct would not offer the government sufficient measures to prohibit PMC activities from damaging UK interests abroad (Straw, 2002: 6). The reaction of the government is more inclined to the position of the industry that has suggested a voluntary code of conduct. The Government therefore “notes” the conclusion of the FAC and “considers that it would in any case be in the interests of reputable private military companies to draw up a voluntary code of conduct. Adherence to this code could become a factor in any decisions taken under a regulatory regime” (Straw, 2002: 6). At the heart of not only this Government response, but also the FAC recommendations lies in the recognition that PMCs might offer legitimate services (which have yet to be clearly defined), and that a regulatory regime should balance administrative costs with the “costs and benefits of the activities of PMCs” (Straw, 2002: 7).

Notably, the outbreak of the Iraq war, closely after this debate on the Green Paper did not only stall the regulatory process, but also tipped the balance in favour of the self-regulation of the industry. The UK war effort in Iraq would have proved untenable without private sector support and PMSCs have demonstrated their pragmatic legitimacy in Iraq (Kruck, 2014: 124-125). More generally, contractor support enhances the policy options in both financial and foreign policy, which may positively reflect on British society more generally, as it is the ultimate beneficiary of an effective, but financially less burdensome British defence policy (Heidenkamp, 2012: 16). Heidenkamp (2012: 27) analyses that contractor support to operations is essential in the UK because, on the one hand, public demand for a “light military footprint” and on the other hand, “the operational need for specialist technological capabilities and niche

skills". In addition to this "audience-specific" pragmatic legitimacy, Elms and Phillips (2009: 411-412) note that the readiness of prospective employees to work for these companies and of financiers to invest in them strengthen the pragmatic legitimacy vis-à-vis other audiences. However, when the industry grew in size and attracted more media attention, pragmatic legitimacy seemed insufficient to gain acceptance in the broader public domain (Elms and Phillips, 2009: 412).

Both defensive and reputational factors have stimulated efforts of self-regulation in the private military and security industry. On the defensive side, companies have adopted self-regulation to escape top-down state regulation (De Nevers, 2009: 493). Following Donald (2006) the urge to avoid government regulation is an explanatory factor for the industry's proactive attitude towards self-regulation. The "first-mover advantage" may offer companies the opportunity to arrive at less demanding standards than would be the case if instigated by state regulation (De Nevers, 2009: 493-494). The reputational stimulus is driven by the assumption that a favourable, high-standard reputation might provide new market opportunities and generate greater public trust (De Nevers, 2009: 494, De Nevers, 2010: 222-223). Indeed, both factors can be discerned in the British case. The British Association of Private Security Companies was established as a trade association in 2006 and aimed to "promote the interests and regulate the activities of UK linked firms that provide armed defensive security services in countries outside the UK" (BAPSC, 2013). The BAPSC has propagated self-regulation as the most appropriate way to ensure compliance with international humanitarian and human rights law. A good reputation was considered a sufficient informal sanction mechanism to secure a responsible industry via "peer pressure and shaming" (De Nevers, 2010: 224). The relation between the UK government and the BAPSC is based on trust, since the charter of the BAPSC stipulated that members would have to decline contracts endangering UK interests and values (Ranganathan, 2010: 324). Additionally, Bearpark and Schulz (2009), members of the BAPSC, point out the informational advantage of PMSCs, over external observers. Thirdly, in 2008 the Montreux Document had already alleviated the most pressing concerns on human rights and international humanitarian law abuses, which granted the UK government some room to manoeuvre.

### 5.1.2 Consultation on Promoting High Standards of Conduct by Private Military and Security Companies

In the context sketched above, the government repeated its consultation exercise, although from a different perspective. The aim was not longer to consult the public on the most appropriate policy towards PMSCs, but to collect information on how best to achieve the predetermined policy of promoting high standards of PMSC conduct (FCO, 2009a: 1). Again, this shows that the executive still pulls the strings when it comes to setting the terms of the negotiations. This consultation, launched by the Conflict Group of the Foreign and Commonwealth Office in February 2009, invited interested stakeholders to share their views on the following government proposal in order to strengthen it: “to promote high standards in the industry by working with the relevant trade association, using our status as a key buyer, and increasing international standards through international cooperation” (FCO, 2009a: 2). The delineation of the scope of the consultation indicates that a national licensing regime is no longer on the table as a viable option (FCO, 2009a: 3, 12-13). Keeping in mind the key role for PMSCs in the recent campaigns in Iraq and Afghanistan, then Foreign Affairs Secretary David Miliband (FCO 2009a: 5) clearly sets out the basic outlines of this consultation and of any future policy on PMSCs:

The PMSC industry is essential, inevitable and international. It is essential, because people need protecting in dangerous countries; inevitable, because governments cannot deploy protection in all theatres; and international, because the market and suppliers are global. Any proposal by the British Government needs to recognise both this industry’s positive and legitimate role globally, as well as the geographic extent of arenas in which PMSCs operate.

Milliband adds that any regulation should be based on international cooperation since the PMSC industry operates globally (FCO, 2009a: 5). Reminiscent of previous observations, the 2009 consultation hinges on a double consideration.

First, both the government and NGOs fundamentally depend on PMSCs to secure their operations in the hostile environments of for instance Iraq and Afghanistan. Second, PMSCs may nevertheless compromise human rights or humanitarian law and “assist internal repression, or provoke or prolong internal or regional tension” (FCO, 2009a: 6). But even this second consideration is framed in terms of the risk of disgracing the industry.

Even more than the Green Paper, this consultation reveals the role of agenda-setting power in guiding the policy outcome. A 2005 review of regulatory options by Whitehall officials had already revealed that a licensing regime would fail to meet the objectives of promoting high standards of conduct and that this aim would more likely be met by self-regulation via an industry association in international cooperation. This consultation therefore prompts stakeholders to share their views on the measures proposed to strengthen the high standards of the industry (FCO, 2009a: 6). The common theme of the propositions is the cooperation between the government and the industry. The policy proposal open for consultation consists of three interrelated objectives:

- a) Working with the UK industry to promote high standards through a code of conduct agreed with and monitored by the Government.
  - b) Using our status as a key buyer to contract only those companies that demonstrate that they operate to high standards.
  - c) An international approach to promote higher global standards, based on key elements of the UK approach
- (FCO 2009a: 8).

The summary of responses, published by the FCO (2009b), does not show any major modification of these objectives and methods in the UK’s policy. This implies that the meetings between Lord Malloch Brown, PMSC and NGO representatives and the BAPSC did not lead to a questioning of the overarching objectives. Nor did the individual meetings between stakeholders and FCO officials. Nor did the twenty five responses received during the consultation (FCO, 2009b: 5). Of these responses, seven came from NGOs, seven from PMSCs, three from trade associations, four from academics, two from the

general public, one from an international organisation and one from a security auditor (FCO, 2009b: 5).

Somewhat more surprisingly, the FCO also saw “no conclusive evidence” being offered to call into question the composite package of the Consultation Document as the best option to reach the objective of high industry standards (FCO, 2009b: 6). Despite the fact that more than one third of the respondents having suggested a legislative initiative for the regulation of PMSCs (e.g. a licensing or registration regime), the government dismissed this option because it identified severe difficulties to its enforcement and because it did not receive “convincing evidence during the consultation period to suggest that a legislative approach would successfully meet its objectives” (FCO 2009b: 7). Furthermore, the government considers legislation to be too costly for small companies as well as it implies the risk of the industry’s relocation offshore (FCO, 2009b: 17). With regard to a code of conduct for PMSCs, government involvement would be limited to monitoring the implementation of the code (FCO, 2009b: 11). PMSCs that fulfil the “minimum requirement of standards” may be members of the association, but EU law forbids the government to make membership of the UK trade or monitoring association a requirement for bidding for government contracts (FCO, 2009b: 11). Since the latter would be a violation of EU law, it is sufficient that companies fulfill “equivalent standards” (FCO, 2009b: 11). The government sees the code of conduct as a mechanism to ensure respect for international humanitarian and human rights law (FCO, 2009b: 12). To prevent states using a PMSC as a straw man to circumvent their obligations under human rights law and international humanitarian law, the code “would provide guidance on what functions PMSCs should or should not perform” and would restrict PMSC services to defensive tasks (FCO, 2009b: 12). The use of force by PMSCs will not be prohibited, but depends on client needs and the particular security environment. It will be based upon the relevant stipulations in international humanitarian law and human rights law (FCO, 2009b: 12).

Ultimately, the government aims to use the code of conduct as a mechanism to promote a transparent industry (FCO, 2009b: 12). The industry will be involved in the drafting of the code to give their opinion on client confidentiality and similar issues (FCO, 2009b: 12). The government would demand two kinds of



reports from the trade association or the monitoring body. The first assesses PMSCs' "compliance" with the above-mentioned standards, while a second kind of report would recount the incidents involving an association member (FCO, 2009b: 14). In reaction to the responses of the consultation, the government concedes that conflicts of interest might arise if the auditing is to be performed by the trade association itself, since the latter might be dependent on the membership fees of the member in case. As such, it might be hesitant to impose sanctions (FCO, 2009b: 14). To counter this critique, the government will evaluate which existing public or private compliance or auditing organisations are most able to assume this function and considers the secondment of government experts (FCO, 2009b: 14). The government refers responsibility for the implementation and monitoring of the code of conduct to the trade association or monitoring body (FCO, 2009b: 16). This implies that the trade association or monitoring body should annually report to the government on its audit and compliance findings (FCO, 2009b: 16). Consultation between government officials and NGO representatives might enhance the availability of information, but "Government officials would remain the official point of contact" (FCO, 2009b: 16).

The government relies heavily on the reputational consequences for companies transgressing the stipulations of eventual codes of conduct and does not consider prohibiting disreputable companies from bidding for future contracts as a viable policy option. Rather, its proposed policy amounts to the following: "PMSCs would voluntarily sign up to an agreed code in order to enhance their commercial reputation. By signing up to the code they would have to accept the terms and conditions of membership which would include disciplinary procedures" - but no criminal sanctions (FCO, 2009b: 19). This commercial reputation is the central incentive for companies to sign up to the code. However, the government concedes that EU law prohibits that only members of the British trade association would be allowed to compete for contracts and considers using contractual stipulations as a mechanism to include the code's (or equivalent) requirements (FCO, 2009b: 20). The government's unwillingness to propose legislation implies that it does not make membership of the trade association compulsory. However, the government also believes that reputational considerations would stimulate companies to sign up, as

membership signals the adherence to high standards to prospective clients (FCO, 2009b: 23-24). This reasoning is predicated upon the belief that “ethical corporate employers would prefer to employ PMSCs who comply with the domestic code/international standard rather than seek alternative, cheaper service providers” (FCO, 2009b: 28).

The above intentions are currently being put into practice. The government has opted for the Security in Complex Environments Group (SCEG), a special interest group of Aerospace Defence and Security, to develop national standards for PMSCs (Bellingham, 2011). This is because the consultation raised some doubts on BAPSC’s capacity to effectively instigate self-regulation. Upon strong recommendation of the SCEG, the government advised on PSC 1 as the applicable accreditation standard. PSC 1, the ‘Management System for Quality of Private Security Company Operations’, is developed by the American Society for Industrial Security (ASIS). The UK does not directly provide certification under PSC 1, but the UK Accreditation Service licenses third-party private accreditation bodies that, in turn, issue certification for PMSCs respecting PSC 1.

The reaction of NGOs was mixed. Rights and Accountability in Development (RAID) (2009) criticised the short time frame of three months in which the contributors to the FCO consultation may formulate their response, especially in the light of the six years of inaction since the Green Paper. It further raised doubts on the undue influence of the BAPSC on the final FCO proposals and does not consider self-regulation to be sufficient in controlling PMSC activities. More fundamentally, RAID (2009) questions one of the basic premises of the government’s approach:

In RAID’s experience it is often not possible to draw a distinction between reputable and disreputable PMSCs. As BAPSC acknowledges ‘Most tenders and bidding processes on the private market happen under severe time constraints’; how therefore, would it be possible for PMSCs to vet staff thoroughly or assess the likely impact upon human rights of the contract in question?

Nevertheless, calls from NGOs did contribute to the delegitimation of part of the private military and security industry, namely the direct combat operation services. The controversy on Executive Outcomes' combat operations in Angola and Sierra Leone, and Sandline's in Sierra Leone and Papua New Guinea helped push both companies out of the market (Percy, 2012: 943), although a decisive factor for this was also the backfiring of these operations for home states. Subsequently, most private providers of military and security services refrained from direct combat operations and started calling themselves PSCs (Percy, 2012: 943).

However, NGOs did not take an unambiguous position towards PMSCs. Despite the principled opposition of some NGOs against PMSCs on the basis that they are nothing more than "corporate mercenaries" (Mathieu and Dearden, 2006), other humanitarian NGOs frequently make use of private security services (Stoddard, Harmer and DiDomenico 2008).<sup>48</sup> This reflects the straddle many humanitarian NGOs, and UN agencies for that matter (Spearin, 2008), have to overcome between their moral repugnance of PMSCs and the pragmatic legitimacy of PMSCs, which are often the sole actors that can effectively secure their operations. In precarious security situations, where 'new' threats have hampered state capacity to effectively provide security, a "lack of organizational capacity and in-house expertise" combined with considerations of cost, flexibility and local knowledge drives NGOs to hire PMSCs (Stoddard, Harmer and DiDomenico, 2008: 21-23). The other option, retreating from unstable environments, is considered even less desirable by NGOs. The market situation furthermore hinders NGO influence on the governance of the industry. Since states are more important PMSC clients than NGOs, the former undeniably have more "market power" than the latter (Spearin, 2008). Additionally, PMSCs enjoy a certain amount of "humanitarian legitimacy" conferred upon them by being employed by humanitarian NGOs, which is however not their sole source of legitimacy, since the legitimacy they derive from being employed by states is more significant (Spearin, 2008: 8-10).

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<sup>48</sup> Stoddard, Harmer and DiDomenico (2008: 19-20) note that "[o]f the humanitarian field and regional offices surveyed around the world, 61% reported using one or more services from local PSPs over the past year, while 35% had used the services of international PSPs".

In both of the above consultation processes, a more mundane source of influence is the “revolving door” between PMSCs, the military and the government, and the lobbying opportunities this brings with it.<sup>49</sup> When former UK defence minister Taylor joined the French arms producer Thales as an adviser, this debate gained new impetus. Other examples include former Major-General Graham Binns becoming chief executive of Aegis Defence Services and former Admiral Sir John Slater becoming director and adviser to the British division of Lockheed Martin (Syal and Hughes, 2010). Paul Boateng served as Chief Secretary to the Treasury and British High Commissioner to South Africa, before taking up a position as non-executive director in Aegis Defence Services (CAAT, 2014). Close relations between government and the defence industry are cultivated by both sides. For the defence industry, direct access to civil servants opens up market opportunities. It gives the industry some leverage to influence policy decisions in their favour. The UK government, on their part, in its ‘Business Appointment Rules for Civil Servants’, acknowledges that “it is in the public interest that people with experience of public administration should be able to move into business or other bodies outside central Government” (UK Civil Service, 2013: 25). To address public criticisms of unwarranted links between government and industry, the Advisory Committee on Business Appointments (ACOBA) reviews applications of civil servants wanting to move to the private sector, within two years after the end of their civil service employment. The applications made for the ACOBA reveal that in 2012, an Army Lieutenant-General, an Airchief Marshall, an admiral, a former UK ambassador, a former chief executive of UK Trade and Investment and the former head of the Downing Street policy unit, took up positions in the defence industry (CAAT, 2014).

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<sup>49</sup> The War on Want Report ‘Corporate Mercenaries’ (Mathieu and Dearden, 2006) charts this revolving door for the UK and US case. What concerns the BAPSC, director-general Andy Bearpark has worked for the CPA in Iraq, served as “Deputy Special Representative of the Secretary General (DSRSG) in charge of the EU Pillar of the United Nations Mission in Kosovo (UNMIK)”, held posts in the Overseas Development Administration and served as private secretary to prime minister Thatcher.

<[http://www.europarl.europa.eu/meetdocs/2009\\_2014/documents/sede/dv/sede150311audcvbearpark\\_/sede150311audcvbearpark\\_en.pdf](http://www.europarl.europa.eu/meetdocs/2009_2014/documents/sede/dv/sede150311audcvbearpark_/sede150311audcvbearpark_en.pdf)>, (accessed 01/07/2014).

In addition, several forums facilitate an institutionalised dialogue between government and the defence industry. The 'Defence Suppliers Forum', for instance, as the "major conduit for MOD-industry relationships", brings together representatives from the government and from the defence industry, both international companies and small and medium enterprises, under chairmanship of the Secretary of State for Defence (UK MOD, 2014). The Defence Growth Partnership (DGP) furthermore promotes cooperation between government and the defence industry. Under the objective of "securing prosperity", this strategy should enhance national security and stimulate economic growth through the export of military goods and services (DGP, 2013: 2-3). The strategy and focus of this partnership have been based on "joint analysis completed by the Government and Industry" (DGP, 2013: 2). The Department of Business Innovation and Skills together with the defence industry lead the DGP and the Ministry of Defence, in its role of customer, takes up a supportive role (DGP, 2013: 3). The DGP further involves academia and trade associations. In the Technology and Enterprise Team, one of the eight subgroups of the DGP, government and the defence industry will "identify key future customer defence needs" and the Intelligent Systems Team, another subgroup, will "work together to develop the next generation of world leading intelligent systems products and services" (DGP, 2013: 11). The Ministry of Defence spent over twenty billion pounds on the UK defence industry in FY 2012-2013, of which nine organisations received more than £500 million (UK MOD, 2013: 1, 8). The majority of these organisations are members of the ADS, to which SCEG is a special interest group. Thus, at least in an indirect way, at the very least, PMSCs have access to policymakers and work in partnership with the UK government. None of the above forums include representatives from non-governmental organisations.

Despite these close relations between the government and the industry, already in 2007, 103 members of the House of Commons welcomed the War on Want report *Corporate Mercenaries: the Threat of Private Military and Security Companies* and expressed their dissatisfaction with the self-regulation of the industry and proposed to instigate binding legislation (Early Day Motion 690, 2007). The War on Want report argued against the self-regulation of the industry, for outlawing "PMSC involvement in all forms of direct combat and

combat support, understood in their widest possible sense” and for an individual licensing mechanism (Mathieu and Dearden, 2006: 21).

## 5.2 Montreux Document

### 5.2.1 Negotiation Process

Although a regulatory framework applicable to PMSC employees was in force before the development of the Montreux Document, the academic disagreement on the appropriate interpretation of the relevant legal stipulations serves to illustrate that, if not confusing, this framework was at the very least not straightforward. Combined with a lack of political will to instigate prosecutions (Dickinson, 2011, Human Rights First, 2008: 33),<sup>50</sup> this uncertainty created a sphere of *de facto* impunity for crimes and human rights abuses committed by PMSC personnel in situations of armed conflict<sup>51</sup> (cf. Ryngaert, 2008). The notorious abuses of international humanitarian and human rights law by PMSC personnel spurred the International Committee of the Red Cross (ICRC) (as the neutral “guardian” of international humanitarian law) and the Swiss Federation (as the “Depositary of the Geneva Conventions”) to take up their role in protecting the accomplishments of international humanitarian and human rights law (Cockayne, 2009: 418) and to start a pragmatic approach towards more comprehensive regulation. In September 2007, the Blackwater incident of Baghdad<sup>52</sup> reaffirmed the urgency of this matter and provided a renewed impetus to the negotiations which, at that time, did show some signs of slowing down and even stalling (Tougas, 2009: 324).

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<sup>50</sup> Prosecution happened on an ad hoc basis, depending on the political will of the executive branch to enforce existing laws (Human Rights First, 2008: 33).

<sup>51</sup> The immunity granted to PMSC personnel from prosecution under Iraqi law by Order 17 (2.1) of the US Coalition Provisional Authority signed in december 2006, contributed to the impression of impunity.

<sup>52</sup> In a gunfight at Nisour Square in Baghdad involving Blackwater employees, 17 people were killed of which 14 kills were later found to be unjustified. (Johnston and Broder, (2007) “F.B.I. Says Guards Killed 14 Iraqis Without Cause”. New York Times. 14/11/2007. A 1.

<[http://www.nytimes.com/2007/11/14/world/middleeast/14blackwater.html?pagewanted=2&\\_r=1&sq=17.%20nov.%202007&st=cse&adxnnl=1&scp=5&adxnnlx=1273766420-cNwM0%20GG97voGrMuBOQeA](http://www.nytimes.com/2007/11/14/world/middleeast/14blackwater.html?pagewanted=2&_r=1&sq=17.%20nov.%202007&st=cse&adxnnl=1&scp=5&adxnnlx=1273766420-cNwM0%20GG97voGrMuBOQeA)>, (accessed 01/07/2014).

Let us start by immediately putting into perspective one of the central features of the Montreux Document, namely that it is an intergovernmental document. It was indeed the Swiss Federal Department of Foreign Affairs (FDFA) and the ICRC that acted as norm entrepreneurs and organised three meetings in the run up to the signing of the document. Government representatives, representatives from the private security industry and civil society delegates were present.<sup>53</sup> In addition to these meetings, the ICRC and the Red Crescent Movement organised a workshop on the topic at their 30th International Conference (Tougas, 2009: 322). Some of the reluctance of the ICRC in this process is to be explained by the unintended consequence of drafting the Montreux Document: while not intended as a legitimisation of PMSCs (Tougas, 2009: 324), it implicitly accepts that there is a role for PMSCs in contemporary armed conflict and can thus be interpreted as a *de facto* recognition and legitimisation of the industry and the services it provides (del Prado, 2009: 443). In this respect, the signing of the Montreux Document might well have represented the institutionalisation of the political failure of the abolitionist approach. Nevertheless, far from solving all debate on the regulation of the PMSC industry, the Montreux Document only provides a “first step” in an on-going regulatory process (Tougas, 2009: 345).

Before analysing the content of the Montreux Document in depth, I will first briefly highlight its drafting process. The drafting strategy deliberately reached beyond governmental representatives and diplomats. In a search for additional expertise, the FDFA and the ICRC reached out to the International Peace Institute and the Geneva Centre for the Democratic Control of Armed Forces, both non-profit research organisations, to co-organise expert meetings on which non-governmental experts from the academic, NGO and industry sectors were also present (Cockayne, 2009: 420). This strategy succeeded in partly moving the drafting process out of the political realm and into a more technical-administrative realm. Contrary to the UN Draft International Convention on the Regulation, Oversight and Monitoring of Private Military and Security Companies, that ran counter to the objections of mainly the US and the UK

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<sup>53</sup> More information on the run-up to the signing of the document can be found at <<http://www.eda.admin.ch/eda/en/home/topics/intla/humlaw/pse/psechi.html>>, (accessed 01/07/2014).

(Juma, 2011: 2), the Montreux Document took an explicitly “humanitarian, apolitical approach” mainly driven by the desire to reach a practical result (FDFA and ICRC, 2009: 42). A more ambitious, hard law approach is taken by the ‘UN Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination’ that presented its draft Convention to the UN Human Rights Council in July 2010. However, until now, two obstacles have always impeded progress in the negotiations on this draft convention. First, the drafters took a top-down approach towards regulation. That is: they intended to devise a new convention in order to “reaffirm and strengthen State responsibility for the use of force and reiterate the importance of its monopoly of the legitimate use of force” (UN, 2010: 23). This strategy implied that some of the current PMSC activities, mostly in the US and the UK, would be outlawed, which led to a debate in the Human Rights Council that saw developing states, like Russia and China, defend the idea of a new binding treaty against the opposition of the US, UK and EU (White, 2011: 150-151). The US and the UK viewed the implementation of the Montreux Document and the International Code of Conduct as sufficient and did not favour the drafting of new binding law (Juma, 2011: 2). They also saw a new convention as an obstacle to their preferred policy option, namely the international standardisation of the criteria for national regulation (Juma, 2011: 2-3). From a more pragmatic point of view, it was argued that the draft convention’s licensing procedure might be too costly for some states and that a new international treaty would require more encompassing consultations (Juma, 2011: 3). Second, PMSCs were not officially included in the initial stages of the drafting process, which was reserved for state and NGO representatives and academics (UN, 2010). Because the Working Group still associates PMSCs with mercenaries, the industry itself did not support this process.

In contrast, the FDFA and the ICRC actively propagated the pragmatic approach of the Montreux Document and lobbied with non-participating states to broaden the scope of the initiative. The success of the Montreux Document, in contrast to the UN Draft Convention, can partly be explained by the support it received from the industry. The Montreux Process succeeded in securing the support of the industry (e.g. the International Peace Operations Association (IPOA) and the BAPSC) because of its “non-judgmental” approach (Percy,



2012: 953-954). The IPOA welcomes the Montreux Document as an “affirmation of the global value of ethical private sector operations in conflict, post-conflict and disaster relief operations” and appreciates the light it sheds on PMSC employees’ legal accountability in these missions (IPOA, 2008). In addition to support from the industry, the Montreux Document also received considerable state support, because, in the middle of 2007, after two initial meetings had already clarified the state of the debate, participants settled on a “conservative” drafting strategy that sought to reconcile “the legitimacy of existing legal norms (attracting state legal advisers) to the legitimacy of existing practice (broadening the draft’s appeal to industry and government procurement, military and other relevant practitioners)” (Cockayne, 2009: 419). Since it is in states’ interest to be able to continue to use PMSCs, Percy (2012: 954) argues that the pragmatic approach of the Montreux Document was the “only possible international agreement”. On the contrary, the UN Working Group has aired critique. It considers the Montreux Document a “good promotional document” that nevertheless “failed to address the regulatory gap in the responsibility” of states for the actions PMSCs and their personnel (UN Working Group, 2009, cited in White, 2011: 136). The UN Draft Convention, in contrast to the Montreux Document, also served a “higher purpose”, namely to define inherently governmental functions and safeguard these functions from further privatisation (Juma, 2011: 8).

Towards the final stages of the negotiations, the opinions of two groups of negotiators came to differ. The US and the UK, Canada and Australia favoured the weakening of the emphasis on human rights, to be replaced by an emphasis on international humanitarian law; but a number of non-governmental organisations -including the ICRC, Amnesty International, Human Rights Watch, Human Rights First and SwissPeace - propagated a human rights approach stressing, among others, states’ duties of “due diligence, prevention and remedial obligations” (Cockayne, 2009: 421). To their own disappointment, non-governmental organisations were (physically) excluded from the final negotiation processes when states adopted the conventional intergovernmental strategy - a negotiation between legal advisers of participating governments (Cockayne, 2009: 422). NGO contributions were thus limited to the preliminary stages of the negotiation process, contributing to the clarification of the issues

at stake. We can conclude that the exclusion of NGOs in the final stages had an influence on the final outcome of the negotiations. This explains the disappointment of some NGOs with the final outcome. For Amnesty International, the future effectiveness of the document depended on the prior clarification of some “substantive gaps” in the international law framework. According to them, in contrast to the good practices section (that is explicit enough to help states make progress in respecting international humanitarian law and human rights law), part one of the document lacks the “detail and precision” to serve as a useful guide for states to identify their obligations in their dealings with PMSCs. This opens up room for interpretation to states. Disregarding some “key relevant propositions of international law”, for instance ‘due diligence’, as well as contemporary initiatives on business and human rights, such as the Ruggie initiative, the Montreux Document is undeniably a step in the right direction, but “neither as comprehensive nor specific as it might have been” (Amnesty International, 2008).

Despite the involvement of the ICRC and the opening up of the Montreux Document to interested non-state parties, its legitimacy is hampered by its initiation by an “ad hoc group of 17 states [which] clearly cannot represent the wider international community” (White, 2011: 134). Nevertheless, due to an active dissemination process, the number of signatory states now stands at fifty and three international organizations have also joined.<sup>54</sup> This attests to the popularity of this pragmatic approach.

### 5.2.2 Montreux Stipulations

To recapitulate, on 17 September 2008, after an extensive consultation period during which state representatives, industry experts and civil society actors were heard, the Swiss FDFA and the ICRC jointly presented The Montreux Document: on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict, to which at that time seventeen states subscribed. The subtitle

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<sup>54</sup> A list of signatory countries and organisations is available at <<http://www.eda.admin.ch/eda/en/home/topics/intla/humlaw/pse/parsta.html>>, (accessed 01/07/2014).

indicates that the document does not encompass all PMSC activities. The aim of the Montreux Document is restricted to “promote respect for international humanitarian law and human rights law whenever PMSCs are present in armed conflicts” (FDFA and ICRC, 2009: 31). In support of this, the Montreux document brings to mind “existing legal obligations” of states, PMSCs and PMSC employees and presents “good practices to promote compliance with international humanitarian law and human rights law during armed conflict” (FDFA and ICRC, 2009: 9). With regard to the former, part one of the document recalls international legal obligations of states, as found in customary international law, international humanitarian and human rights law and interprets these with respect to the activities of PMSCs. The good practices described in part two do not reflect existing law but intend to help contracting parties to respect relevant international humanitarian and human rights law and to promote “responsible conduct” when coming into contact with PMSCs whether in- or outside situations of armed conflict (FDFA and ICRC, 2009: 16). Lacking legally binding effect, the good practices do not draw upon sources of international law, but on “corporate codes of conduct, national legislation, administrative instruments, judicial and administrative decisions and regional political statements” (Cockayne, 2009: 405). This attests to the pragmatic approach of the document. It promotes nor prohibits their activities but merely wants to prevent international humanitarian law and human rights abuses. In other words, it strives for the removal of the negative consequences of PMSCs. Following Krahmann (2013), the Montreux Document incorporates two different interpretations of the state monopoly on violence. Krahmann (2013: 54) argues that “[t]he first part rests on the 20<sup>th</sup>-century understanding of the norm”, which reserves the right to armed force to states and their personnel. The second part legitimises the use of force by PMSCs.

The first part of the Montreux Document clarifies the international legal obligations of states in their dealings with PMSCs.<sup>55</sup> Existing international humanitarian law, human rights law and customary law provide that contracting

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<sup>55</sup> The Montreux Document defines PMSCs as “private business entities that provide military and/or security services, irrespective of how they describe themselves” (FDFA and ICRC, 2009: 10). Acknowledging the international nature of the PMSC industry and in response some of the problems identified above, the Montreux Document is modeled upon a division of states into ‘contracting’, ‘territorial’ and ‘home’ states.

out to PMSCs does not release contracting states of their obligations under international law (FDFA and ICRC, 2009: 11). States may outsource certain activities, but not those activities assigned to a state authority by international humanitarian law (FDFA and ICRC, 2009: 11). Moreover, in doing so, states remain the ultimate (and only) principal under international law. This attests to a principal-agent model of a state-PMSC relationship whereby it falls to contracting states, as principals, to make sure that the PMSCs under contract respect international humanitarian law (FDFA and ICRC, 2009: 11). As part of their obligations under international law, states should “take appropriate measures to prevent, investigate and provide effective remedies for relevant misconduct of PMSCs and their personnel” (FDFA and ICRC, 2009: 11). Under some conditions,<sup>56</sup> contracting states carry responsibility for violations of international humanitarian law, human rights law or other relevant law by PMSC personnel. When these are “attributable to the Contracting State” the latter should provide reparations (FDFA and ICRC, 2009: 12). The responsibilities of territorial and home states are broadly similar to those of contracting states, with this difference that they cannot be held directly responsible for breaches of international humanitarian or human rights law committed by PMSCs on their territory or by PMSCs registered under their law. The obligations of territorial and home states are mostly situated on the level of ensuring respect by PMSCs for international humanitarian and human rights law.

With regard to the responsibilities of PMSCs and their personnel themselves, the Montreux Document states that they should respect national law, both the national ‘translation’ of international humanitarian and human rights law, as well as national “criminal law, tax law, immigration law, labour law, and specific regulations on private military or security services” (FDFA and ICRC, 2009: 14). PMSC personnel should not only respect the national law of the state where they perform their activities, but also of their state of nationality (FDFA and ICRC, 2009: 14). Since the Montreux Document only recalls existing legal

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<sup>56</sup> In line with customary international law, PMSC actions are attributable to states if PMSCs are “a) incorporated by the State into their regular armed forces in accordance with its domestic legislation; b) members of organized armed forces, groups or units under a command responsible to the State; c) empowered to exercise elements of governmental authority if they are acting in that capacity [...] or d) in fact acting on the instructions of the State” (FDFA and ICRC, 2009: 11).

obligations, it confirms the above observations that the status of PMSC employees under international humanitarian law is determined on a case-by-case basis. In turn, this status determines their obligations and protections under international humanitarian law (FDFA and ICRC, 2009: 14-15). On the responsibility of superiors of PMSC personnel, the Montreux Document asserts that in the absence of properly exercised control, for which international law provides guidelines, not only military or civilian government officials, but also PMSC directors “may be liable for crimes under international law committed by PMSC personnel under their effective authority and control” (FDFA and ICRC, 2009: 15).

The good practices of part two constitute soft standards, without binding legal effect, that are intended to guide and assist states in shaping their relations with PMSCs operating both inside and outside areas of armed conflict. In line with the first part, the second part of the Montreux Document is divided into good practices for contracting, territorial and home states. Where relevant, the good practices for contracting states might be extrapolated to apply to the broader client base of PMSCs, among others consisting of international organisations and non-state actors, non-governmental organisations and corporations (FDFA and ICRC, 2009: 16). The underlying aim of these good practices is to ensure “respect for international humanitarian law and human rights law”, to promote responsible state conduct in this domain and to help states implement their obligations under these bodies of law (FDFA and ICRC, 2009: 16). The document does not legally bind any state to implement any specific good practice and recognises not only that states might not possess the capacity to implement specific practices, but also that some practices might not fit particular circumstances (FDFA and ICRC, 2009: 16). The document therefore invites states to consider the good practices, while keeping in mind and respecting their other obligations under international law, for instance as members of the UN or as a consequence of bilateral agreements (FDFA and ICRC, 2009: 16). Relevant for this research project is that “any of these good practices will need to be adapted in practice to the specific situation and the State’s legal system and capacity” (FDFA and ICRC, 2009: 16).

Contracting states should first of all evaluate the adequacy of their legislation

and “procurement and contracting practices” (FDFA and ICRC, 2009: 16). The Montreux Document does not authoritatively determine which services are open to outsourcing. Rather, it passes this question on to contracting, territorial and home states, that should decide what services are open to outsourcing (for contracting states), which services may be performed by PMSCs and their employees on their territory (for territorial states) and which services are open to export (for home states). Territorial states are encouraged to “require PMSCs to obtain an authorization to provide military and security services in their territory” (FDFA and ICRC, 2009: 21-23). In addition, they might also take into consideration the development of “rules on the provision of services by PMSCs and their personnel”, as well as establishing a monitoring and accountability mechanism (FDFA and ICRC, 2009: 23-25). Home states are equally encouraged to design an authorisation system, with concomitant procedures, criteria and terms of authorisation (FDFA and ICRC, 2009: 25-27).

Having reviewed the content of the Montreux Document, we can safely state that this document serves as the justification of a technique of meta-governance. Upon the instigation of the FDFA and the ICRC - whom we can conceptualise as norm entrepreneurs in the sense that they want to preserve existing norms - states have agreed to a document that creates no new legal obligations, but that serves to mitigate the international humanitarian and human rights abuses delegitimising the PMSC industry. Within the limits of national and international law, this document confirms the right of non-state actors to hire PMSCs.

### 5.3 International Code of Conduct for Private Security Providers

At present, 708 PMSCs have signed the International Code of Conduct for Private Security Providers (ICOC), thus following the original 58 that did so in November 2010. This steep rise attests to the success of this form of self-regulation. The ICOC is nevertheless not a classical instance of self-regulation since the ICOC Association, that promotes and oversees the implementation of the ICOC, consists of stakeholders from the industry, governments and civil society. The ICOC builds upon and endorses the stipulations of the Montreux Document and the ‘Respect, Protect, Remedy’ framework developed by UN

Special Representative on Business and Human Rights Ruggie (ICOC, 2010: 3). The ICOC is itself the start of a more encompassing initiative aiming at the development of common international standards for the provision of security services and at the establishment of an external and independent governance and oversight mechanism (ICOC, 2010: 4).

By signing the code, companies promise to abide by its stipulations, to respect applicable bodies of law, to address “allegations of activity that violates any applicable national or international law or this Code” and to cooperate with official authorities with regard to jurisdictional investigations (ICOC, 2010: 3, §6). However, the code only applies to those security providers working in complex environments and does not impose any legal obligations or liabilities on its members (ICOC, 2010: 6, §§13-14). Signatory companies promise to cooperate with interested stakeholders and national accreditation bodies to achieve, first, national standards and, second, a harmonisation of those national standards into “an international set of standards based on the Code” (ICOC, 2010: 6, §10). The Code binds the signatory companies to erect a temporary multi-stakeholder steering committee that will start up the “governance and oversight mechanism” (ICOC, 2010: 6, §11). Signatory companies are required to undergo continuous auditing by an independent governance and oversight body (ICOC, 2010: 4, §8). By signing the code, companies signal their intention to respect (through due diligence) and require their personnel to respect, existing legal obligations and UN Security Council sanctions (ICOC, 2010: 7, §§21-22). When signatory companies or their personnel reasonably suspect a breach of these prohibitions, they are required to report this to their client and to the competent authorities (ICOC, 2010: 7, §24). The code requires signatory companies and their personnel to “treat all persons humanely and with respect for their dignity and privacy” and to report infringements of the code (ICOC, 2010: 8, §28). The rules for the use of force to be adopted by the companies should be in line with relevant bodies of law and agreed upon by the client (ICOC, 2010: 8, §29). Force should only be used if unavoidable and in agreement with relevant legal provisions. It shall thus be limited to a “strictly necessary” and proportionate level (ICOC, 2010: 8, §30). Firearms can only be used in self-defence or defence of others when faced with an “imminent threat of death or serious injury” (ICOC, 2010: 8, §31). Signatory companies may take

part in activities of detention if stipulated in a contract with a state and if the PSC employees have received training in the relevant bodies of law (ICOC, 2010: 8, §33). Concerning the use of force, detention and apprehension, we can observe that employees of signatory companies should observe all relevant legal stipulations, both national and international. In line with existing international law, torture or other cruel, inhuman or degrading treatment or punishment is forbidden under any circumstance and knowledge of any such behaviour should be reported to the competent authorities (ICOC, 2010: 9, §§35-37). Similar stipulations apply to “sexual exploitation and abuse or gender-based violence”, “human trafficking”, “slavery and forced labour”, child labour in its worst forms and discrimination (ICOC, 2010: 9-10, §§38-42). The personnel of signatory companies should be identifiable when performing contractual activities and will register and license any vehicles and hazardous material used in performing these activities (ICOC, 2010: 10-11: §43).

Signatory companies promise to “exercise due diligence” in their personnel selection, vetting and performance assessments procedures and personnel should possess the necessary qualifications, as determined by applicable law (ICOC, 2010: 11-12, §§45-49). A similar responsibility falls to companies with respect to the selection and vetting procedures of their subcontractors (ICOC, 2010: 12, §§50-51). Companies are furthermore required to respect labour law and to professionally train their personnel in the content of the Code and in relevant bodies of national and international law (ICOC, 2010: 12, §55). The use of weapons and other war material is restricted to personnel that has received appropriate training in relevant bodies of law and is governed by applicable laws (ICOC, 2010: 13, §57).

The Swiss-based, multi-stakeholder and not-for-profit International Code of Conduct for Private Security Providers’ Association (ICOCA) aims to “promote, govern and oversee implementation” of the ICOC and to “promote the responsible provision of security services and respect for human rights and national and international law in accordance with the Code” (ICOCA, 2013: 1, §2.2). The private security industry, civil society organisations and governments are the three stakeholders represented in the Association. Eligibility for Membership for PSCs depends on certification by the Association upon review



of the applying member's respect for the principles and standards of the Code (ICOCA, 2013: 2, §3.3). For states and international organisations, membership criteria include supporting the Montreux Document, intending to back the ICOC principles and engaging in the association's activities. Members of the civil society should be not-for-profit and independent organisations "with a demonstrated institutional record at the local, national or international level of the promotion and protection of human rights, international humanitarian law or the rule of law" (ICOCA, 2010: 2, §3.3.3).

The ICOC Association consists of a General Assembly, a Board of Directors and an Executive Director who supervises the Secretariat, to be supplemented if necessary by other bodies (ICOCA, 2013: 3, §5.1). At least once a year, all members will convene in the General Assembly which is the "supreme governing body of the Association" and which has the right to oversee and dismiss the other corporate bodies (ICOCA, 2013: 3, §§6.1-6.3) as well as to vote on the decisions of and agenda items proposed by the Board of Directors. The executive decision-making Board of Directors meets annually and is composed of an equal number of representatives of each of the stakeholder pillars. Most relevant for the purposes of this text, is that the ICOC Association "shall be responsible for certifying under the Code that a company's systems and policies meet the Code's principles and the standards derived from the Code and that a company is undergoing monitoring, auditing, and verification, including in the field" (ICOCA, 2013: 6, §11.1). The Association equally assumes responsibility for the oversight of "Member companies' performance under the Code, including through external monitoring, reporting and a process to address alleged violations of the code" and will issue public reports, at least annually, on these activities (ICOCA, 2013: 8, §§ 12.1, 12.3). The Association will help members establish "fair and accessible grievance procedures that offer effective remedies" (ICOCA, 2013: 8, 613.1).

Together with the Montreux Document, the ICOC and its Association can be conceptualised as the institutionalisation of the legitimacy of non-state security providers. The legitimisation process drove states, PMSCs and civil society organisations (to a lesser extent) to interpret existing normative and legal rules, to apply to emerging PMSCs. Especially in the ICOC process, states have now

taken a position of meta-governance. While they have been the major drafters of existing legislation on international humanitarian and human rights law, as well as national laws, the ICOC process in particular shows how PMSCs interpreted and explained these laws to the extent that they opened up room for the reframing of the state monopoly on force in favour of the legitimization of private security providers. In this process, civil society organisations took the role of norm defenders, in the sense that they acted upon the human rights violations by PMSC employees to make the case for the reaffirmation of the state monopoly. However, they were soon overtaken by the private military and security industry by their proposals of self-regulation. In contrast to the UN Draft Convention, which took a top-down approach disposed towards the preservation of “inherent government functions”, the Montreux Document and the ICOC were enthusiastically received by the industry.

In conclusion of this chapter, it is revealing to briefly compare the terminology used in the various regulatory initiatives reviewed above. The shift in terminology from PMCs (in the Green Paper), over PMSCs (in later British consultations and in the Montreux Document), to PSCs (in the industry self-regulation in the UK (PSC 1) and in the ICOC), illustrates a double evolution. Initially, PMCs did offer offensive military services, for instance in Sierra Leone, Angola and Papua New Guinea (Avant, 2005: 17). However, many of the companies originally performing combat activities in these regions are now defunct, partly because of the negative reputational impact of some widely publicised abuses and because these combat PMCs seriously undermined the sovereignty of African states (Howe, 1998: 528), partly because their activities could compromise Western states’ neutrality and drag them into breaches of international law (Vierucci, 2011: 246). In short, the use of combat PMCs impacted upon other norms of international law and was considered by many a bridge too far. Frontline activities were reaffirmed in the US as “inherently governmental functions” reserved to state employees (Cameron and Chetail, 2013: 192-197). Similarly, although less formalised, the UK only outsources non-core functions (Kinsey, 2009: 98). The leeway for PMCs offering offensive services has thus narrowed considerably. Opinions on which functions are inherently governmental diverge, and especially in times of neoliberal privatisation and in times of war, “inherently governmental” is defined narrowly

(Luckey and Manuel, 2012: 6-8). Similarly, in the UK, the scope of core functions has narrowed (Kinsey, 2009: 98-99). Paradoxically, it is only the expansion of 'non-inherently governmental' and 'non-core' functions that has made it possible for states to engage in long-term military operations.

The second evolution points at an expanding scope of defensive activities. The ICOC (2010: 5) speaks of PSCs as companies offering "guarding and protection of persons and objects". The outsourcing and privatisation of these defensive services has now been legitimised and the use of defensive force is no longer the prerogative of the state. Nevertheless, offensive and defensive tasks are not easily distinguishable, especially in situations of armed conflict. The protection of a military convoy, while a defensive task, becomes offensive if the convoy has to pass through disputed territory. Furthermore, the protection of an extraction site in insecure environments shows can scarcely be labeled defensive, since control of natural resources might in itself constitute a military objective. Therefore, even if states have regained control over combat activities, the expansion of non-core, defensive services points to a significant infringement on the state monopoly on violence. The UN mercenary convention does not differentiate between offensive and defensive activities, but groups them together under the notion of "taking part in hostilities". The same observation applies to the OAU Convention. Moreover, the distinction between offensive and defensive does not resurface in the interpretation of the concept of 'direct participation in hostilities'. The ICRC, in its 'Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law' (Melzer, 2009), equally does not make this difference. Direct participation, following this guidance, is an act that meets the following criteria:

1. The act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict [...] and 2. There must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operations of which that act constitutes an integral part (direct causation) and 3. The act must be specifically designed to directly cause the required threshold of harm in support

of a party to the conflict and to the detriment of another  
(Melzer, 2009: 46).

Even defensive activities might be argued to fall under the notion of direct participation as they are in support of one party and might inflict damage to an adversary. However, the Montreux Document, the ICOC and the UK's policy of self-regulation contribute to the legitimization of non-state authorised defensive services. Following a strict interpretation of the notion of direct participation, this implies that PMSCs can legitimately participate in hostilities, if they restrict themselves to defensive protection. This constitutes a reinterpretation of the concept of taking direct part in hostilities since it makes a difference between offensive services (reserved to the state) and defensive services (eligible for outsourcing). In this way, it partly undermines existing anti-mercenary conventions since neither the UN, nor the OAU convention makes this difference. In conclusion, the above regulatory initiatives contributed to a more narrow interpretation of illegitimate mercenary activity as 'offensive combat force'.

## Conclusion

The legitimate use of force by private military and security companies (PMSCs) that are not only employed by states but also by non-state clients, challenges the relevance of the state monopoly on violence. The orthodox, realist-informed account has argued that in the neoliberal ideological environment of the 1980s, in light of changing demand and supply of military force, states deliberately outsourced and later privatised part of their defence functions. The former strategy can be said to enhance the defence capability of the state: states retain the steering function, but outsource the rowing to more cost-efficient private actors. However, when former superpowers are now dependent on operational support from PMSCs for major military operations, PMSCs possess some leverage to direct a state's military policy and even this independent steering capacity is compromised. The latter strategy involves a direct transfer of decision-making authority on security provision to non-state actors.

This outsourcing and privatisation strategy comes into conflict with at least two norms that were legally codified in the twentieth century. First, the anti-mercenary norm precludes the exercise of violence for private gain, outside legitimate control. Second, the norm of the state monopoly on violence outlaws the non-state authorisation of coercive force. Both norms seem to have been undermined by the rise and institutionalisation of PMSCs. The United Kingdom's policy of self-regulation of the private military and security industry, the international Montreux Document and, to a lesser extent, the International Code of Conduct for Private Security Providers, have legitimised non-state actors as providers and auspices of defensive armed force. Realists argue that the above norms have lost their relevance in shaping the organisation of military force. Constructivist scholarship, on the contrary, maintains that these norms still exist and have decisively steered these regulatory initiatives. This text has taken a first step in bringing together these two perspectives. It addressed why PMSCs have emerged as legitimate wielders of coercive force, despite a normative environment that was hostile to the private use of force. It took seriously the findings of the constructivist style of reasoning, but argued that only the crossing of paradigmatic boundaries opens up venues for a credible answer to the research question.

In reply to the research question, this text started from existing constructivist models of norm change, but moved beyond them to incorporate a more explicit notion of realist-constructivist power to explain which norm entrepreneurs were more successful in shaping the changing normative environment. Only a realist-constructivist account, it has been argued, can fully explain the rise of PMSCs. The resulting cycle-model of norm change, inserted with a notion of realist-constructivist power, served as a heuristic tool for the subsequent analysis of normative change in the domain of military force. With the help of this tool, I traced the norm negotiations via which PMSCs were able to successfully claim a legitimate role in the global provision of security. Although the empirical analysis has suggested that this tool can help forward constructivist scholarship, further research is needed, in other domains, to substantiate it and to further confirm its usefulness.

This text has followed Steffek's (2003: 267) conceptualisation of international governance as a "negotiated consensus" that is subsequently written down in law or conventions. Furthermore, legal stipulations were seen as the reflection or codification of norms. Thus, a change in legal stipulations is indicative of a change in underlying norms. This text has traced the process of the negotiation on the above-mentioned regulatory initiatives. The cycle of norm change proceeded in the following steps. Norms inevitably have to be interpreted and translated into practical guidelines in order to cover real-life situations. Moreover, normative structures have to adapt to novel situations. The first stage of norm change, in a cyclic model, is a period of confusion and uncertainty that invalidates established meanings and practices, and that reveals friction between normative guidelines and new phenomena. If combined with an exogenous shock that obscures prevailing power relations, this opens up room for norm entrepreneurs to call into question existing meanings and norms and to engage in the construction of new ones. It was indeed in the state of confusion and flux of governance after the Cold War that PMSCs came to prominence. After the initial 'peace dividend' optimism, the new wars of the 1990s and early 2000s blurred the boundaries between criminals, civilians and legitimate combatants. New security providers emerged on the international scene. Due to the reluctance of former superpowers to intervene in conflicts that did not

constitute a direct threat to their own survival, a market for force opened up, in which emerging private military companies (PMCs) offered combat services to a variety of state and non-state clients, for whom they delivered some notable military successes. This private involvement in the provision of armed force raised normative questions. Even if direct combat activities proved for many to be a bridge too far, later private military and security companies (PMSCs), offering mainly defensive services, rendered existing categorisations of armed forces obsolete. PMSC employees were not fully covered by existing anti-mercenary conventions and did not have a clear status under international law. This desire for greater clarity is the first step in the cycle of normative change. The notorious human rights and international humanitarian law abuses by PMSC personnel and the culture of impunity conferred a sense of urgency on this debate.

The normative debate takes place in the second phase, in which arguments are exchanged between participants. This text has argued that negotiations do not happen in an ideal-speech situation, where every participant has an equal opportunity to make his case and where a rationally agreed upon consensus is reached. Rather, a more powerful actor will be more successful in influencing the outcome of this negotiation. Power is understood, in this text, as realist-constructivist power or the capacity to shape intersubjective understandings. There are different dimensions to this capacity. An actor's success in setting the terms of the negotiation shapes every discursive outcome. This happens most visibly when a participant has the material resources to create the environment of the negotiation. The capacity to include or exclude people from the debate affects its outcome. Equally, the resources to participate in the negotiation contribute to the impact on its outcome. Actors who have the resources to attend meetings and issue briefings will more likely have a greater influence on its outcome than those who do not possess these resources. On a more fundamental level, the capacity to set the terms of the negotiation refers to those resources that allow one to create a secure environment within which a debate can take place. On a cognitive level, the ability to impose one's worldview on other negotiators is a major source of realist-constructivist power. Epistemic power, as the ability to create a plausible worldview and to offer valid knowledge, is the most profound dimension of realist-constructivist power.

However, when different worldviews are presented to decision-makers, it is frequently the option most 'usable' for decision-makers that is adopted.

These observations are confirmed in the cases under review. Early PMCs successfully offered offensive combat services in areas of armed conflict. However, the culture of impunity surrounding them raised moral objections from what we might call norm entrepreneurs, understood in the sense of Finnemore and Sikkink (1998) as actors having strong notions of what is morally appropriate. These norm entrepreneurs, most notably civil society, did not envision a norm change. Rather, they aimed at the reaffirmation and enforcement of the previously existing norms against mercenaries and of the state monopoly on violence. In the case of the UK, these calls from civil society were only picked up by the government once the Sandline Affair had demonstrated that the unofficial sanctioning of PMCs by government officials might endanger the neutrality of the UK government and might drag along the UK in the breach of the sovereignty of another state. As Thomson (1994) has shown, one reason why non-state violence was taken off the market was because it might compromise the neutrality of the state of nationality of mercenaries. This line of reasoning still holds. The green paper on PMCs directly resulted from the Sandline Affair and set the terms of reference for the subsequent debate. This shows that the UK executive had a decisive role in staging the negotiation. In this debate, the Foreign and Commonwealth Office successfully framed PMCs as the only 'realistic' option available to provide security for the citizens of failing states in the global periphery and for humanitarian NGOs working in those areas. This implied that other options, e.g. internationalisation or scaling down state ambitions, were dismissed. The UK green paper recognises the straddle between, on the one hand, 'morally optimal' security provision, and on the other hand, the pragmatic provision of security by PMCs. The road to regulation can be seen as an attempt to align these two positions.

It was clear from the outset that the aim of the British government was not to abolish PMCs, as some NGOs proposed. The green paper acknowledges that the private military industry might positively contribute to the provision of security, if properly regulated. In other words, the UK government recognised



that PMCs offered 'usable knowledge' - they had the expertise and the resources to provide security in an uncertain world. PMCs were, in other words, pragmatically legitimate. Underlying the green paper was the assumption that abuses were not inherent to the private military industry, but rather resulted from the lack of a conclusive regulatory framework. In this light, we can also think of the green paper as the start of the formalisation of previously informal procedures. Reminiscent of the anti-mercenary norm, legitimate control on private security provision became the key objective. In terms of this norm, the green paper recognised that, when hired by a 'just authority' and if comprehensively controlled, PMCs might legitimately provide security. The subsequent discursive negotiation aimed at clarifying who could legitimately hire PMCs, and what control mechanisms were appropriate. NGOs actively contributed to the debate, but, as their criticisms on the final outcome make clear, their contributions to the negotiations were largely overlooked. The final outcome of this debate in the British case showed close, not to say complete, resemblance with the preferred option of the private military and security industry, namely voluntary self-regulation. In the case of the UK, this policy concludes a cycle of norm change. Non-state actors can now legitimately control the provision of security and the exercise of violence for defensive purposes. The resulting regulatory framework has decisively been shaped by PMSCs, who were hired by state and non-state clients alike because of their knowledge of the (local) security environment. Especially the operations in Iraq and Afghanistan, where PMSCs performed essential security services, constituted the deathblow to NGO efforts at more stringent regulation. The expert knowledge provided by PMSCs in these situations proved more 'usable' for states than the options proposed by NGOs. As security professionals, PMSCs were not only considered to have the knowledge on how to provide security, but also on how to appropriately control that security provision. Due to the lack of publicly available information on the private military and security industry, PMSCs were a necessary source of information policymakers could turn to for advice during the regulatory process. For the UK, self-regulation ties to a long tradition of self-regulation of other industrial sectors (De Nevers, 2010). It aims to preserve the agility of the private military and security industry, for which an image of stronger regulation is essential. In the wake of the green paper, the question on which regulatory approach to take was therefore

reformulated as: how to ensure high standards of conduct for the private military and security industry? However, throughout the regulatory negotiations, the scope of services PMSCs can legitimately provide has been somewhat narrowed. The UK government only outsources non-core functions and PMSCs are not hired for offensive purposes. Although non-state auspices can hire PMSCs for private protection, the range of legitimate services is limited to defensive purposes - as implicit in PSC 1, the preferred self-regulatory mechanism for the UK. The state retains the monopoly on offensive operations. This is reflected in the evolution of the terminology in the British case. While the green paper speaks of PMCs, later initiatives talk about PMSCs, and the PSC1 only speaks of PSCs.

A similar process has taken place in the negotiations on the Montreux Document. The International Committee of the Red Cross and the Swiss Federal Department of Foreign Affairs acted as norm entrepreneurs aiming to preserve international humanitarian law. NGOs were included in the primary stages of the negotiations. However, when the final discussions neared, NGOs, except the International Committee of the Red Cross, were excluded from the table. States acted as gatekeepers in the negotiation process and insisted on an intergovernmental negotiation of the final draft. In this way, the human rights focus of the document was somewhat weakened. Again, NGOs showed disappointment with the final outcome. Nevertheless, the pragmatic approach of the Montreux Document proved successful if measured in terms of the number of joining states. One reason for this success is that it does not create new obligations for states since it is only a reminder of existing state obligations. It thus serves as the *de facto* legitimation of the private military and security industry since it consolidates existing practices, within the limits of existing international humanitarian and human rights law. In other words, the Montreux Document offered a particular interpretation of the requirement of legitimate authority: if respecting the boundaries of existing legal stipulations, non-state PMSC clients are themselves legitimate authorities. This implies that PMSCs can only offer defensive services. The Montreux Document serves as the legal anchoring of a neoliberal approach to security provision, that prefers a decentralised decision-making of the market as the most efficient solution to a particular (security) demand. The state suffers from an information

disadvantage vis-à-vis market players and retreats to a meta-governance role: it defines the boundaries within which security provision is to take place. The more ambitious approach of the UN Draft Convention, that intended to define 'inherent government functions', proved unsuccessful; partly because it did not have the full backing of the industry.

In the case of the International Code of Conduct for Security Providers, this retreat of the state is even more pronounced. Whether to avoid more restrictive binding regulation, or to enhance the reputation of the industry, this initiative has received significant backing from PMSCs. It further aims to include states and civil society as stakeholders in its Association, thus conferring upon it some kind of participatory democratic legitimacy. The ICOC consolidates PMSCs as legitimate, defensive, security providers.

None of the above initiatives have created binding legislation outlawing the private military and security industry. Rather, they have resulted in the *de facto* legitimization of a part of this industry, namely of those companies offering defensive services with respect to the rule of law. This was possible because of the coinciding interests of PMSCs and their clients. Contrary to the options proposed by NGOs, the knowledge and expertise brought to the debate by PMSCs was usable for states. In this way, a coalition of interests formed. Due to their pragmatic legitimacy, PMSCs were hired by both state and non-state actors to secure their operations in unstable environments. Other options - scaling back state ambitions, or retreating from insecure areas - proved less desirable. The road taken was to preserve the PMSC industry, while enhancing its accountability to a legitimate authority. In the end, this strategy resulted in the re-articulation of the anti-mercenary norm. On the one hand, offensive combat activities were brought back under the control of the state. Only non-offensive - non-core, tasks in the UK, the so-called non-inherently governmental functions in the US - were on the table for outsourcing. Core, offensive, tasks stayed the prerogative of the state. At the same time, this realm of core or inherently governmental tasks has gradually shrunk - most notably in times of war - to allow for a broader use of PMSCs. On the other hand, defensive roles were open for outsourcing and privatisation. If respecting the boundaries of existing law, PMSCs could legitimately be employed under non-state auspices.

This division of military activity into offensive and defensive roles points to a reformulation of the anti-mercenary norm. In the anti-mercenary conventions of the UN and the Organisation of African Unity, no distinction is made between defensive and offensive tasks. These are grouped together under the concept of 'taking part in hostilities'. Due to this reinterpretation of 'taking part in hostilities', PMSCs can now legitimately offer defensive services in situations of armed conflict, while this would have been considered mercenarism under a strict reading of the anti-mercenary conventions. Thus, the anti-mercenary norm has been partly undermined. Legitimate control on the exercise of violence is still considered essential, but self-regulation is assumed to achieve that aim. PMSCs themselves are considered to be best placed to promote high standards of the industry. The state monopoly on violence was also reframed in the process: the state now holds a monopoly on formulating a range of legitimate security goals, through meta-governance, but, in the case of privatisation, gives away the steering and rowing functions to non-state actors.

Several conclusions can be drawn from these observations. First, changes in the material environment, or, at least, the successful framing of changes, shape the opportunity to call into question existing norms. In this case, these changes were the collapse of the bipolar world order and the emergence of new wars. What is more, material resources underlie any attempt to participate in the discursive negotiation. In order to construct a new normative environment, an actor has first of all to be present in the discursive negotiation. In this debate, PMSCs possessed two kinds of material resources unavailable to NGOs. First, the well-organised professional networks of the private military and security industry and the revolving door between government and the private military industry proved an asset to PMSCs. Second, PMSCs' pragmatic legitimacy was a leverage to gain a foothold in the normative debate. They offered usable knowledge to states, in contrast to civil society, and this granted them the opportunity to help shape the regulatory and normative framework. PMSCs proved capable of securing the operations of states and other clients and even contributed to the identification of security threats, for which they subsequently provided a cost-efficient solution. Looking for security, states still opt for strategies that will most likely further their own interests, but also take into account normative constraints. The aim of the governance initiatives on the

private military and security industry was then to devise a regulatory framework that offers states the opportunity to achieve as much of their security objectives as possible (i.e. for the lowest price), while precluding public criticism. States have remained the gatekeepers to this deliberation process, even literally by excluding NGOs in the final negotiations on the Montreux Document. The eventual legitimization of PMSCs was made possible through a process that aimed at bringing the pragmatic legitimacy of PMSCs in line with existing norms. Along the way, some of these norms were re-articulated.

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